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SUPREME COURT, U.S.

No. 73-1395

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE J. WILSON, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The court of appeals rendered no opinion in dismissing the appeal. The opinion of the court of appeals on petition for rehearing (App. B, *infra*, pp. 3a–9a) is not yet reported. The memorandum and order of the district court (App. D, *infra*, pp. 11a–15a) are reported at 357 F. Supp. 619.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, p. 1a), was entered on September 21, 1973. A timely petition for rehearing was denied on January

15, 1974 (App. B, *infra*, pp. 3a–9a). By order of February 6, 1974, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including March 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy clause bars the United States from appealing to the court of appeals from an order of the district court, dismissing an indictment on the ground of unnecessary pre-indictment delay, which was entered after a jury returned a guilty verdict.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

18 U.S.C. 3731, as amended, 84 Stat. 1890, provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

1. In an indictment returned on October 28, 1971, in the United States District Court for the Eastern District of Pennsylvania, respondent George J. Wilson, Jr., was charged with having embezzled funds of a labor organization, in violation of 29 U.S.C. 501(c). The indictment alleged that respondent, business manager of International Brotherhood of Electrical Workers, Local 367, had converted funds belonging to the union in the form of a check issued by two officers of the local, Robert Schaefer and Robert L. Brinker. It was charged that the check had been issued for the purpose of paying the cost of a wedding reception for respondent's daughter (App. B, *infra*, p. 4a).

Respondent filed a motion to dismiss the indictment for delay in the institution of the prosecution; at two pre-trial hearings, he established that Schaefer and Brinker, the signatories to the check in issue, were no longer available to testify, due to Brinker's death and Schaefer's terminal illness. The motion to dismiss was denied, and respondent was tried and found guilty by a jury (App. B, *infra*, p. 5a).

On April 18, 1973, after the verdict of guilty was returned, the district court entered an order dismissing the indictment because of unnecessary pre-indictment delay which allegedly prejudiced respondent's right to a fair trial (App. D, *infra*, pp. 11a–15a). The district court made no effort to reconcile this order with its pre-trial order, entered after a hearing, which denied the identical motion to dismiss, although it did base its finding of prejudice on evidence heard at both the pre-trial hearing and the trial (App. D,

infra, pp. 14a–15a).

The United States filed a notice of appeal pursuant to the Criminal Appeals Act, 18 U.S.C. 3731, which authorizes an appeal to the court of appeals from an order of the district court dismissing an indictment "except * * * where the double jeopardy clause of the United States Constitution prohibits further prosecution." On September 21, 1974, the court of appeals, relying upon *United States* v. *Sisson*, 399 U.S. 267, held that "the district court's order was not appealable by the government under 18 U.S.C. 3731" and entered a "Judgment Order" dismissing the indictment (App. A, *infra*, p. 1a).

On the assumption that the court of appeals was relying on that portion of *Sisson* which construed the old Criminal Appeals Act "as confining the Government's right to appeal—except for motions in arrest of judgment—to situations in which a jury has not been impaneled" (399 U.S. 302–303), a petition for rehearing or rehearing *en banc* was filed, since it was plain from the legislative history that Congress intended to overrule *Sisson* when it amended the Criminal Appeals Act (18 U.S.C. 3731) to permit appeals from a dismissal of indictment except where the Double Jeopardy Clause prohibits further prosecution. Moreover, on the authority of cases such as *United States* v. *Dooling*, 406 F. 2d 192 (C.A. 2), certiorari denied *sub nom. Persico* v. *United States*, 395 U.S. 911, which held that it was improper for a district court judge to grant a post-trial motion to dismiss an indictment on the same grounds examined and rejected prior to trial, and that mandamus was available to set aside

such a dismissal, a petition for a writ of mandamus was filed as an alternative to a petition for rehearing.

On January 15, 1974, the court of appeals denied the motion for rehearing in a six page opinion (App. B, *infra*, pp. 3a–9a).[1] Rather than relying on a construction of Section 3731, the court of appeals held that the post-conviction dismissal for unnecessary delay in prosecution was an acquittal and that further appellate review was barred by the Double Jeopardy Clause.

The court of appeals held that regardless of label "the trial judge's disposition is an 'acquittal' if it is a legal determination on the basis of facts adduced at the trial relating to the general issue of the case" (App. B, *infra*, pp. 3a–9a). Although the basis of the dismissal had nothing directly to do with the general issue in the case (the defendant's guilt or innocence), the court of appeals held that, since the facts relied on also were relevant to a determination of the general issue, the dismissal was in fact an acquittal (App. B, *infra*, p. 6a):

> While there may be occasions where an appeal may lie from a district court's dismissal of an indictment or information because further prosecution is not barred in the double jeopardy clause, we cannot agree that this is such a case. Here the record indicates that defendant filed post-trial motions for arrest of judgment, judgment of acquittal, and for a new trial. The district court, in reaching its legal determination,

[1] The petition for rehearing *en banc* was denied with one judge dissenting (App. C, *infra*, p. 10a). The court of appeals also denied the application for a writ of mandamus (App. C, *infra*, p. 10a).

> relied on facts adduced at trial relating to the general issue of the case.

Having concluded that the order was an "acquittal", the court of appeals, relying on *United States* v. *Sisson,* 399 U.S. 267, held that appellate review was barred even though the only relief sought was an order vacating the dismissal and directing the entry of a judgment of conviction (App. B, *infra,* p. 6a):

> Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution * * *. [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense," *United States* v. *Ball,* 163 U.S. 662, 671 (1896).

REASONS FOR GRANTING THE WRIT

The Criminal Appeals Act, as amended by the Omnibus Crime Control and Safe Streets Act of 1970, was expressly intended to authorize an appeal from an order of the district court terminating a criminal prosecution in all cases in which an appeal would not violate the Double Jeopardy Clause. The Act, as the court of appeals held, "establishe[s] the double jeopardy clause as the only bar to appeals by the United States from a dismissal of an indictment or information" (App. B, *infra,* p. 6a).[2]

[2] Since the Court of Appeals for the Third Circuit, consistent with other courts of appeals, has construed the Criminal Appeals Act to permit appeals in all cases in which the Constitution permits, we are treating the issue raised here solely in terms of the Double Jeopardy Clause.

The cases broadly construing the Criminal Appeals Act to

The holding of the court of appeals (1) that a post-conviction order dismissing an indictment, which was not based on the sufficiency of the evidence, is an acquittal and (2) that the Double Jeopardy Clause bars an appeal from such an acquittal even where a successful appeal would not result in a retrial, but merely the entry of a judgment of conviction in accordance with the verdict of the jury, marks a substantial departure from prior holdings of this Court and other courts of appeals, and raises a substantial issue regarding the meaning of the Double Jeopardy Clause. Since the issue involves a conflict among the courts of appeals over their appellate jurisdiction, it is particularly appropriate for review. "Otherwise the courts

encompass all orders terminating a criminal prosecution (except when barred by the Double Jeopardy Clause), including acquittals and orders in arrest of judgment. include *United States* v. *Jenkins*, No. 73-1572, (C.A. 2), decided December 11, 1973, where Judge Friendly wrote (Slip op. 700):

"* * * Congress intended to extend the Government's right of appeal in criminal cases as far as it constitutionally could. If the language left any doubts on that score, they would be set to rest by the report of the Senate Committee on the Judiciary, 91st Congress, No. 91-1296, at 4-13. The appeal will therefore lie unless the Double Jeopardy clause prevents interference with appeallant's acquittal * * *."

Accord: *United States* v. *Serfass*, No. 73-1736 (C.A. 3), decided February 20, 1974; *United States* v. *Martin Linen Supply Co.*, 485 F. 2d 1143 (C.A. 5), certiorari denied, No. 73-743, February 19, 1974; *United States* v. *Esposito*, No. 72-1825 (C.A. 7), decided June 12, 1973, certiorari denied, No. 73-432, January 7, 1974; *United States* v. *Brown*, 481 F. 2d 1035. Cf. *United States* v. *Southern Railway Co.*, 485 F. 2d 309 (C.A. 4); *United States* v. *Rothfelder*, 474 F. 2d 606 (C.A. 6), certiorari denied, 413 U.S. 922. (These cases however, are in conflict with regard to the scope of the Double Jeopardy Clause in various contexts).

and the parties must [continue to] expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case." *United States* v. *Sisson*, 399 U.S. 267, 307.

1. There is a conflict among the courts of appeals regarding the appealability of a post-conviction order dismissing an indictment. In *United States* v. *Zisblatt*, 172 F. 2d 740 (C.A. 2), appeal dismissed, 336 U.S. 934, the Court of Appeals for the Second Circuit held that an appeal from a post-conviction order of the district court, which dismissed an indictment under the statute of limitations, was not barred by the Double Jeopardy Clause. Speaking for the court, Judge Learned Hand wrote (172 F. 2d at 743):

> * * * [T]he question becomes whether to reverse the dismissal and enter a judgment of conviction upon the verdict would violate the defendant's constitutional privilege. Had the trial judge directed a verdict, so that it would have been necessary upon reversal to subject the defendant to trial before a second jury, that would be "double jeopardy," but, although the Constitution gives an accused person the benefit of any mistakes in his favor of the first jury he encounters, whether it has passed upon his guilt or not, it does not extend that privilege to mistakes in his favor by judges. Indeed, were the opposite true, all appeals from decisions in arrest of judgment would be constitutionally futile because no judgment of conviction could be entered when they were reversed. So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it do not trench upon the constitutional prohibition.[3]

The Court of Appeals for the Second Circuit has continued to adhere to this view. In *United States* v. *Weinstein*, 452 F. 2d 704, certiorari denied, *sub nom. Grunberger* v. *United States*, 406 U.S. 917, the district court entered a post conviction order dismissing an indictment in the "interests of justice". In holding that the Double Jeopardy Clause did not preclude appellate review, even though the dismissal was based on evidence heard at the trial which went to the general issue in the case, the court of appeals held that "[t]he issuance of the writ [of mandamus] in this proceeding will not subject [the defendant] to retrial in violation of his right to be protected against double jeopardy" (452 F. 2d 712–713).[4] Moreover, in rejecting the claim that the order of the district court should be treated as an acquittal, the court stated (452 F. 2d 714):

> [D]efendant's reliance on the *Sisson* holding that an appellate court will look at what a district court did rather than at what it said it was doing, 399 U.S. at 270, 90 S.Ct. 2117, 26 L.Ed.2d 608, is misplaced. What the judge did in *Sisson* was entirely plain. He refused to

[3] In *United States* v. *Zisblatt*, *supra*, the court of appeals, after holding that the Double Jeopardy Clause did not bar an appeal, certified the appeal to this Court. The appeal was dismissed on motion of the Solicitor General solely because it was his view that the old Criminal Appeals Act did not authorize an appeal. See *United States* v. *Sisson*, 399 U.S. at 306.

[4] The indictment in *United States* v. *Weinstein*, *supra*, predated the 1970 amendments to the Criminal Appeals Act. Under the old Act the order was not appealable, and so the United States sought a writ of mandamus.

> enter judgment on a verdict because, in his view, the Constitution prohibited him from doing so. This was, in truth and fact, a judgment of acquittal; the judge believed that, with the evidence taken in the light most favorable to the Government, it still would not support a conviction. The Supreme Court held that such a judgment of acquittal could not be transformed into the rather technical concept of an arrest of judgment, to wit, "the act of a trial judge refusing to enter judgment on the verdict because of an error appearing on the face of the record," 399 U.S. at 280, 90 S.Ct. at 2125, simply by his calling it such. It would be a far cry from this to hold that the order here in question was a judgment of acquittal, which the judge repeatedly said he did not intend to enter, could not rightly have entered and, in all probability, had lost the power to enter. [See, also, *United States* v. *Dooling*, 406 F. 2d 192 (C.A. 2), certiorari denied *sub nom. Persico* v. *United States*, 395 U.S. 911] [5]

Similarly, in *United States* v. *Whitted*, 454 F. 2d 642 (C.A. 8), the Court of Appeals for the Eighth Circuit, citing the holdings of the Second Circuit, entertained jurisdiction of an appeal in circumstances virtually identical to the instant case.[6]

[5] In *United States* v. *Jenkins*, No. 73-1572 (C.A. 2), decided December 11, 1973, the district court, after a non-jury trial, dismissed an indictment on the merits, based on its evaluation of the undisputed facts in light of the applicable law. The court of appeals held that, unlike *United States* v. *Weinstein*, *supra*, this was an acquittal and that an appeal was barred by the Double Jeopardy Clause.

[6] In *United States* v. *Whitted*, *supra*, the district court, based in part on evidence heard at the trial (454 F. 2d at 643), dismissed the indictment on the ground that it could not be sure whether the indictment against the defendant was returned on the basis of the evidence before the grand jury or on the basis of possible bias and prejudice against him (such a claim had been rejected prior to trial). The court of appeals, nevertheless, entertained the appeal and reversed the post conviction order of the district court. Although the opinion did not expressly discuss the double jeopardy issue, its reliance upon *Dooling* and *Weinstein*, which did discuss the issue, seems to indicate its acceptance of the holding in those cases on the availability of appellate review. See, also, *United States* v. *McDaniel*, 482 F. 2d 305 (C.A. 8).

The holding of the court of appeals here, characterizing the order of the district court, which was not based on a determination of the sufficiency of the evidence, as an acquittal from which an appeal is barred by the Double Jeopardy Clause, cannot be reconciled with the holdings of the Court of Appeals for the Second Circuit in *United States* v. *Weinstein*, *supra*, and Court of Appeals for the Eighth Circuit in *United States* v. *Whitted*, *supra*. The conflict should be resolved by this Court.

2. The Court of Appeals for the Third Circuit also misconstrued the opinion of this Court in *United States* v. *Sisson*, 399 U.S. 267. *Sisson* lends no support to the label of acquittal which the court of appeals attached to the order of the district court.

In *Sisson*, where the offense was a refusal to submit to induction into the armed services, the defendant claimed before trial that he was a conscientious objector to military service in Vietnam. At trial, Sisson based his defense principally upon his contention that American participation in the conflict was illegal, but presented evidence in support of his conscientious objection claim as well. After a guilty verdict, the dis-

trict court granted what it termed a motion in arrest of judgment, holding that the Free Exercise Clause of the First Amendment prohibited Sisson's conviction for refusal to submit to induction. The judge recited the facts of the case and explained that Sisson's testimony and demeanor as a witness gave support to his claim of conscientious objection to service in Vietnam.

This Court held that an appeal from the order of the district court was barred by the Criminal Appeals Act then in effect (399 U.S. at 288–289):

> The same reason underlying our conclusion that this was not a decision arresting judgment—*i.e.*, that the disposition is bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial—convinces us that the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty.

In explaining why the order was equivalent to a judgment of acquittal pursuant to Fed.R.Crim.P., Rule 29, the Court wrote (399 U.S. at 289–290):

> For the purposes of analysis it is helpful to compare this case to one in which a jury was instructed as follows [and returned a not guilty verdict]:
>
> "If you find defendant Sisson to be sincere, and if you find that he was as genuinely and profoundly governed by conscience as a martyr obedient to an orthodox religion, you must acquit him because the government's interest in having him serve in Vietnam is outweighed by his interest in obeying the dictates of his conscience. On the other hand, if you do not so find, you must convict if you find that petitioner did wilfully refuse induction."
>
> * * * * *
>
> There are three differences between the hypothetical case just suggested and the case at hand. First, in this case it was the judge—not the jury—who made the factual determinations. This difference alone does not support a legal distinction, however, for judges, like juries, can acquit defendants, see Fed. Rule Crim. Proc. 29. Second, the judge in this case made his decision *after* the jury had brought in a verdict of guilty. Rules 29(b) and (c) of the Federal Rules of Criminal Procedure, however, expressly allow a federal judge to acquit a criminal defendant after the jury "returns a verdict of guilty." And third, in this case the District Judge labeled his post-verdict opinion an arrest of judgment, not an acquittal. This characterization alone, however, neither confers jurisdiction on this Court, see n. 7, *supra,* nor makes the opinion any less dependent upon evidence adduced at the trial. In short, we see no distinction between what the court below did, and a post-verdict directed acquittal.

Of course, a district court may grant judgment of acquittal pursuant to Fed.R.Crim.P., Rule 29, only "if the evidence is insufficient to sustain a conviction." And it was for this reason that the Court observed that "what the District Court did in this case cannot be distinguished from a post-verdict acquittal entered on the ground that the Government did not present evidence sufficient to prove [an essential element of the offense] that Sisson was insincere" (399 U.S. at 299).

In the present case, the district court's order bears

no resemblance to a judgment of acquittal under Rule 29. The order does not turn on a finding that the evidence was insufficient. To the contrary, implicit in the holding of the district court is the finding that the evidence was sufficient; the indictment was dismissed because of an unnecessary delay which may have prejudiced the defendant's ability to rebut or explain that evidence. As in *United States* v. *Marion*, 404 U.S. 307, 312, which involved a pretrial order identical to that at issue here, "[t]he motion to dismiss rested on grounds that had nothing to do with guilt or innocence or the truth of the allegations in the indictment."

3. Even assuming that the order of the district court could properly be characterized as an acquittal, an appeal would not be barred by the Double Jeopardy Clause. Whatever may be the rule where the finder of fact (the jury or the judge trying the case without a jury) acquits, there is no basis for holding that the Double Jeopardy Clause bars an appeal where, in Judge Learned Hand's phrase, "the verdict of guilty remains as a datum" and where all that is at issue is "the correction of error of law in attaching the proper legal consequences to it" (172 F. 2d at 743).

We do not regard the issue as having been foreclosed by *United States* v. *Sisson, supra*. There, after holding that the order was an acquittal for the purpose of the old Criminal Appeals Act, and, therefore, that the Court was without jurisdiction to entertain the

appeal,[7] the Court added the following dictum (399 U.S. at 289–290):

> Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution * * *. [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense," *United States* v. *Ball*, 163 U.S. 662, 671 (1896).

This dictum, however, had little relevance to the case before the Court, since the United States was not seeking "a subsequent prosecution" of *Sisson* but merely to have the district court enter a judgment of conviction in accordance with the jury's verdict. The single case cited by the Court, *United States* v. *Ball*, 163 U.S. 662, unlike *Sisson*, was a case in which "the verdict of the jury, after a trial upon the issue of guilty or not guilty, acquitted Millard F. Ball of the whole charge" (162 U.S. 670); it was held there that the verdict "could not be reviewed, on error or otherwise, without putting him twice in jeopardy" because "a verdict of acquittal * * * is a bar to a subsequent prosecution for the same offence" (162 U.S. 671). See, also, *United States* v. *Kepner*, 195 U.S. 100, where the defendant had been tried in the Philippines without a jury and acquitted by the trial judge. Under Philippine law an appeal was authorized from such

[7] As we have already argued, *Sisson* is readily distinguishable on facts: in that case, a judgment of acquittal on the merits was entered; here the dismissal had nothing to do with guilt or innocence.

an acquittal, and the appellate court apparently had authority to make *de novo* findings of fact on appeal. Citing *United States* v. *Ball, supra,* the Court held that such an appeal is barred by the Double Jeopardy Clause (195 U.S. at 133):

> The *Ball* case, 163 U.S., *supra,* establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the Government. *The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense,* * * * [emphasis added].

These cases, together with *Fong Foo* v. *United States,* 369 U.S. 141, which involved a verdict of acquittal entered before a jury verdict,[8] are all distinguishable from a case such as this, in which a jury has convicted the defendant and a district court judge has improperly attempted to deprive the United States of "the rightful fruits of a valid conviction". *Will* v. *United States,* 389 U.S. 90, 97–98.

Accordingly, the language of *Sisson,* which was

[8] The relief sought there would have required "that the petitioners be tried again for the same offense." *Fong Foo* v. *United States,* 369 U.S. 141, 143. Cf. *Illinois* v. *Sommerville,* 410 U.S. 458.

mistakenly relied upon by the court of appeals, and which "was unnecessary to th[is] Court's decision" should not "be considered as binding authority," *Kastigar* v. *United States,* 406 U.S. 441, 455.[9] The issue whether this dictum should be regarded as an authoritative construction of the Double Jeopardy Clause is a substantial one warranting review by this Court.

[9] Tending to confirm our submission that *Sisson* should not be regarded as dispositive of the double jeopardy issue is the plurity opinion in *United States* v. *Jorn,* 400 U.S. 470. As there stated in discussing *Sisson* (400 U.S. at 478, n. 7):

"It is clear from the record in this case that Judge Ritter's action cannot, as two members of the Court suggest, be classified as an 'acquittal' for purposes of this Court's jurisdiction over the appeal under 18 U.S.C. § 3731.

* * * * * * *

"Of course, as we noted in *Sisson, supra,* at 290, the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction. But *Sisson* goes on to articulate the criterion of an 'acquittal' for purposes of assessing our jurisdiction to review: the trial judge's disposition is an 'acquittal' if it is 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case . . .'"

This language indicates that four members of the Court viewed the holding in *Sisson* solely as one determining "this Court's jurisdiction over the appeal under [the old] 18 U.S.C. 3731." See, also, the dissenting opinion of Mr. Justice White in *United States* v. *Sisson, supra,* 399 U.S. 328, n. 4 (which was joined by the Chief Justice and Mr. Justice Douglas): "I cannot believe that the majority really means to suggest that Congress could not constitutionally authorize an appeal in a case precisely parallel to this one in accordance with currently sought legislation [the present Section 3731] * * *."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
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Assistant Attorney General.
EDWARD R. KORMAN,
Assistant to the Solicitor General.

MARCH 1974.

APPENDIX A

United States Court of Appeals for the Third Circuit

No. 73-1444

UNITED STATES OF AMERICA, APPELLANT,

v.

GEORGE J. WILSON, JR.

Appeal from the United States District Court for the Eastern District of Pennsylvania

(District Court Criminal Action No. 71-587)

Argued September 17, 1973

Before: KALODNER, ALDISERT and GARTH, *Circuit Judges.*

JUDGMENT ORDER

After considering the contention raised by appellant that the order of April 19, 1973, dismissing the indictment after trial and conviction is appealable and *United States v. Sisson*, 399 U.S. 267 (1970), and it appearing therefore that the district court's order is not appealable by the government under 18 U.S.C. § 3731, it is

ORDERED AND ADJUSTED that the appeal be and is hereby dismissed.

By the Court:

ALDISERT,
Circuit Judge.

Attest:

THOMAS F. QUINN,
Clerk.

Dated: September 21, 1973.

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 73-1444

UNITED STATES OF AMERICA, APPELLANT,

v.

GEORGE J. WILSON, Jr.

Appeal from the United States District Court for the Eastern District of Pennsylvania

(District Court Criminal Action No. 71-587)

Present: KALODNER, ALDISERT and GARTH, *Circuit Judges.*

OPINION SUR PETITION FOR PANEL REHEARING

(Filed January 15, 1974)

ALDISERT, *Circuit Judge.*

We have before us a paper,[1] filed by the United States-appelant, which we shall treat as a petition for

[1] Federal Rule of Appellate Procedure 40(b) provides that the petition for rehearing shall be in the form prescribed by Rule 32(a). Rule 32(a) requires that the petition have a cover and that the title of the document appear thereon. Here there was neither a cover nor a title, and the paper was bound with masking tape. The paper which originally requested "rehearing or rehearing en banc" concludes: "It is, therefore, respectfully

rehearing, which seeks, inter alia, panel rehearing of an order entered on September 21, 1973, dismissing this appeal on the ground that the order of the district court was not appealable under 18 U.S.C. § 3731.

An indictment, returned on October 28, 1971, charging the defendant with violation of 29 U.S.C. § 501(c), embezzling funds of a labor organization, alleged that the defendant converted $1,233.15 of the monies of the International Brotherhood of Electrical Workers, Local 367, to use in paying for a portion of the expenses of his daughter's wedding reception at the Easton Hotel. Defendant, business manager of the Union, allegedly converted the money by way of a check signed by two officers of the Union, Robert Schaefer and Robert L. Brinker.

The F.B.I. began an investigation of this case and other cases involving the defendant in April of 1968, and continued it through June of 1970. The investigation concerning the subject of this indictment was completed by the F.B.I. by June of 1969, after which evaluations were made by the Organized Crime Strike Force and by the United States Attorney's Office. These evaluations resulted in a delay which caused the indictment to be returned October 28, 1971, three days prior to the running of the statute of limitations.

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submitted that the petition for rehearing *en banc* be granted or, the alternative that a writ of mandamus issue." We express no little distress that the United States Attorney and the "Department of Justice Office of the Solicitor General" not only have failed to respect the requirements of F.R.A.P. 40(b), but have attempted to combine, in one instrument, a petition for rehearing with an original petition for mandamus. Finding no authority for such a bizarre procedure, we expressly condemn such attempt. To the extent that the paper is designed to serve as a petition for mandamus, the prayer of the petition will be denied.

Prior to trial defendant filed a motion to dismiss the indictment on the basis of prosecutorial pre-indictment delay. Two pre-trial hearings were held, and the defendant established that the two signatories to the check were no longer available: Brinker had died, and Schaefer was terminally ill. The court denied defendant's motion, and the case proceeded to trial. After the jury returned a verdict of guilty, defendant filed motions for arrest of judgment, judgment of acquittal and a new trial. The district court ordered that the case be dismissed pursuant to F.R. Cr. P. 48(b) concluding that the prosecutorial pre-indictment delay had substantially prejudiced the defendant's right to a fair trial under the due process clause of the Fifth Amendment. *See, United States v. Marion*, 404 U.S. 307 (1971). The government appealed; we dismissed the appeal by judgment order.

In its "petition" the government argues that our dismissal of the appeal and our reliance on *United States v. Sisson*, 399 U.S. 267 (1970), overlook the clearly expressed intent of Congress to authorize an appeal from all post-conviction orders except where prohibited by the double jeopardy clause. We disagree.

After the Supreme Court's decision in *Sisson* Congress amended 18 U.S.C. § 3731.[2] That section presently provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

---

[2] The new amendment applies only to criminal cases begun in any district court on or after its effective date, January 2, 1971. Here the indictment was returned on October 28, 1971.

This amended section does no more than establish the double jeopardy clause as the only bar to appeals by the United States from a dismissal of an indictment or information. However, it is well established that the double jeopardy clause bars an appeal by the government from an acquittal. *Price v. Georgia,* 398 U.S. 323, 327 (1970). Since we find that the legal effect of the district court's "dismissal" was a directed verdict of acquittal, the following language from *Sisson* remains applicable:

> Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution. . . . [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence," *United States v. Ball,* 163 U.S. 662, 671 (1896).

399 U.S. at 289–90. (Footnote omitted.) "[T]he trial judge's disposition is an 'acquittal' if it is 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case. . . .'" *United States v. Jorn,* 400 U.S. 470, 478 n.7 (1971). This necessarily requires a careful review of the entire record in each case.

While there may be occasions where an appeal may lie from a district court's dismissal of an indictment or information because further prosecution is not barred in the double jeopardy clause, we cannot agree that this is such a case. Here the record indicates that defendant filed post-trial motions for arrest of judgment, judgment of acquittal, and for a new trial. The district court, in reaching its legal determination, relied on facts adduced at trial relating to the general issue of the case.

> The Court takes notice of the facts brought out in the testimony of the case concerning the potential testimony of Mr. Schaefer. . . . During the trial (N.T. 133–134) the defendant indicated that he never involved himself with bookkeeping or the internal affairs of the office. Finally, Mr. Wilson stated that he ordered no one to write the check in question (N.T. 164–165).
>
> On the [g]overnment's side, it was established that the bill from the wedding reception was sent to the defendant's home address and not to the union (N.T. 62). . . . Other testimony established that Mr. Wilson controlled the union (N.T. 17), and that Mr. Schaefer and Mr. Brinker were office help who owed their jobs to the defendant (N.T. 80, 181).
>
> . . . The Court finds that the unreasonable delay was substantially prejudicial to the case of Mr. Wilson in that the only witness who could explain the circumstances of the check became terminally ill during the period of unreasonable delay. Although the government contends that this is only a showing of potential or speculative prejudice, there is an absolute certainty as a signer of all checks that Mr. Schaefer would add testimony of utmost importance to the trial.

The district court granted the relief sought, but labelled it as a dismissal of the indictment. However, we have been admonished to "be guided in determining the question of appealability . . . not by the . . . [label] the court gave [its decision] but by what in legal effect it actually was. . . ." *United States v. Sisson, supra,* at 279 n. 7.

The government argues that our dismissal of this appeal is in conflict with our holding in *United States v. Pecora,* — F.2d — (No. 72-2173, August 31, 1973) and the Seventh Circuit's recent case of *United States*

v. *Esposito*, F.2d (No. 72-1825, June 12, 1973). Although the court in *Esposito* held that the order of the district court was appealable under amended Section 3731, it stressed:

> For jeopardy purposes the question to be decided is whether the trial court "bottomed" his order "on factual conclusions not found in the indictment" or "on the basis of evidence adduced at trial." *United States v. Sisson*, 399 U.S. 267, 288 (1970). If the court's order "arresting judgment" is based upon evidence produced at trial, it is in the nature of an acquittal and is not appealable under the double jeopardy clause.
>
> A review of the record here shows that the trial judge did not base his order on the evidence adduced at trial.

(Slip opinion at 3.) Thus, the critical distinction between *Esposito* and the case *sub judice* is that here the district court did bottom its decision on evidence adduced at trial.

In *United States v. Pecora, supra*, we held that an order of the district court granting defendant's motion to dismiss based upon stipulated facts for the purpose only of attacking the validity of an indictment was appealable. There we emphasized that "[e]ntering into the stipulation of facts for the purpose only of attacking the validity of the indictment did not constitute the waiver [of defendant's right to a jury trial] . . ." and that "[t]he district court . . . [did not determine] the character of . . . evidence [actually entered into the record]. . . ."

Under the totality of the circumstances of this case, considering that defendant filed pre-trial motions to dismiss, that following two pre-trial hearings the motions to dismiss the indictment were denied, that he was forced to defend the indictment after a jury had

been impaneled and sworn, and that the "dismissal" was entered following post-trial motions for judgment of acquittal or arrest of judgment after the district court based its legal determination on facts adduced at trial relating to the general issue of the case, we cannot say that its dismissal did not operate as an acquittal.

Accordingly, the "petition" for panel rehearing will be denied.

APPENDIX C

United States Court of Appeals For the Third Circuit

No. 73-1444

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE J. WILSON, JR.

Present: SEITZ, *Chief Judge,* and KALODNER, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEISS, and GARTH, *Circuit Judges.*

ORDER

Appellant's petition for rehearing having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. The petition for writ of mandamus to compel the district court to vacate the order of dismissal and enter a judgment of conviction is denied.

Judge Rosenn would grant the petition for rehearing.

By the Court:

ALDISERT, *Circuit Judge.*

Dated: January 15, 1974.

A True Copy:

Teste:

_____,

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX D

Crim. A. No. 71-587.

UNITED STATES OF AMERICA

v.

GEORGE J. WILSON, JR.

United States District Court for the Eastern District of Pennsylvania

April 18, 1973

MEMORANDUM AND ORDER

JOHN MORGAN DAVIS, *District Judge.*

The defendant has petitioned this Court for consideration of a number of post-trial motions which include a motion for new trial, motion in arrest of judgment and motion for judgment of acquittal.

Before commencing a discussion of the issues at hand, the Court will relate a brief account of the facts. The indictment, returned on October 28, 1971, charged the defendant with a violation of 29 U.S.C. § 501(c) which is the embezzlement of funds of a labor organization. The defendant was found guilty by a jury on March 17, 1972, of converting $1,233.15 of the monies of Local No. 367 of the International Brotherhood of Electrical Workers of Easton, Pennsylvania (hereinafter I.B.E.W.) to use in paying for a portion of the expenses of his daughter's wedding reception at the Easton Motor Hotel. The manner in which the money was converted was by way of a check signed

by two officers of the Unions of which Mr. Wilson was Business Manager.

The F.B.I. began its investigation in April 1968 and continued through June 1970. However, the bulk of the F.B.I. examination was completed by June 1968. Following the investigation an evaluation was made by Organized Crime Strike Force of the Department of Justice and by the United States Attorney's Office. The evaluations resulted in a delay which caused the Indictment to be returned three days prior to the running of the Statute of Limitations.

The Court held a pretrial hearing on February 17, 1972, to hear argument on Motions to Inspect the Grand Jury Minutes; for a Preliminary Hearing; and to Dismiss the Indictment. All of the motions were denied. On March 14, 1972, a rehearing was held on the Motion to Dismiss. The Court after hearing the testimony of Mrs. Jean Sippel, the office secretary of the Union, and of George J. Wilson, the defendant (pretrial Notes of Testimony), denied the defendant's Motion to Dismiss.

The defendant presents to the Court six points in support of his Motion for a New Trial. The first point is whether the Court erred in denying Defendant's Motion to Dismiss. The defendant alleges that undue prejudice was caused by an unreasonable pre-indictment prosecutorial delay and is in violation of the Fifth and Sixth Amendments of the Constitution. The leading case on this point is United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.E.2d 468 (1971). In the *Marion* case, supra, the Supreme Court held that the Sixth Amendment right to a speedy trial does not apply until the defendant is actually indicted. Thus the entire basis for this Motion is whether the defendant's Fifth Amendment due process rights have been violated. The Court said at 324, 92 S.Ct. at 465:

> The Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial. . . . Cf. Brady v. Maryland, 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] (1963), Napue v. Illinois, 360 U.S. 264 [79 S.Ct. 1173, 3 L.Ed.2d 1217] (1959).

The Court did not elaborate on substantial prejudice but left this up to future cases.

The first element of a violation of due process is to determine whether there was unreasonable delay. In this case there was a delay of approximately 16 months from the time the investigation was complete to the time the indictment was returned. The Government claims the delay was in evaluating the case by the Organized Crime Strike Force and the Attorney General's Office. Unfortunately, this argument does not impress the Court, and the Court will follow Judge Newcomer's language in United States v. Wilson, Jr. et al., 346 F.Supp. 371, at 374 (E.D.Pa. 1972), when he said:

> It takes some time to transfer a file and bring an indictment, but in this case it shouldn't have taken seventeen months. The Court is of the opinion that there was an unreasonable delay in bringing the indictment in this case.

Thus this Court also finds unreasonable delay.

The Court must now deal with the problem of whether the defendant was substantially prejudiced by the unreasonable delay in bringing the indictment. Under the dictum of the *Marion* decision, supra, it is necessary for the defendant to show the unreasonable delay caused substantial prejudice, not merely speculative prejudice.

The defendant contends that there are two potential witnesses, a Mr. Brinker, Past Treasurer of

I.B.E.W. and a Mr. Schaefer, Past President of I.B.E.W. who were the co-signors of the check involved. It is contended that Mr. Brinker and Mr. Schaefer as co-signors could assist in Mr. Wilson's testimony and possibly explain away the circumstances of the check. Mr. Brinker died prior to 1970 and consequently his testimony would have no bearing on the question of prejudice during the period of unreasonable delay which commenced in late 1970.

However, the potential witness, Mr. Schaefer, who became terminally ill during the period of unreasonable delay, presents a different problem. The question that is presented to the court is whether there is substantial prejudice, if the government unreasonably delays in presenting an indictment and a potential witness becomes incapable of testifying during that period of unreasonable delay. This question differs from the *Wilson* case, supra, before Judge Newcomer because in that case there were other witnesses who could testify on the points which Mr. Brinker and Mr. Schaefer were knowledgeable. Here, the defendant contends that these two men were the only one's knowledgeable on the signing of the check and substantial prejudice resulted because Mr. Schaefer was unable to testify.

The Court takes notice of the facts brought out in the testimony of the case concerning the potential testimony of Mr. Schaefer. Mr. Wilson, the defendant, stated (40–41 of the Notes of Testimony of the pre-trial hearing held on March 14, 1972) that the signing of all union checks was in the hands of Mr. Brinker and Mr. Schaefer. During the trial (N.T. 133–134) the defendant indicated that he never involved himself with bookkeeping or the internal affairs of the office. Finally, Mr. Wilson stated that

he ordered no one to write the check in question. (N.T. 164–165).

On the Government's side, it was established that the bill from the wedding reception was sent to the defendant's home address and not to the union (N.T. 62). Also, Mrs. Jean Sippel, the office secretary for the I.B.E.W. and the individual who prepared the checks for the signature of Mr. Brinker and Mr. Schaefer stated that at no time had a check prepared by her been sent back without being signed. Other testimony established that Mr. Wilson controlled the union (N.T. 17), and that Mr. Schaefer and Mr. Brinker were office help who owed their jobs to the defendant. (N.T. 80,181).

Since both sides make opposite contentions about the potential testimony of Mr. Schaefer, the Court cannot make an adjudication of the veracity of the testimony. The Court finds that the unreasonable delay was substantially prejudicial to the case of Mr. Wilson in that the only witness who could explain the circumstances of the check became terminally ill during the period of unreasonable delay. Although the government contends that this is only a showing of potential or speculative prejudice, there is an absolute certainty as a signer of all checks that Mr. Schaefer would add testimony of utmost importance to the trial. Because of the unreasonable delay, substantial prejudice resulted which violated the defendant's due process rights under the Fifth Amendment.

The remaining points of the defendant's argument need not be ruled upon because the Court will dismiss the indictment on the basis that the defendant was substantially prejudiced prior to trial.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
AUG 13 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-1395

UNITED STATES OF AMERICA
Petitioner,

—v.—

GEORGE J. WILSON, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 15, 1974
CERTIORARI GRANTED MAY 28, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1395

UNITED STATES OF AMERICA

Petitioner,

—v.—

GEORGE J. WILSON, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CHRONOLOGICAL LIST OF DOCKET ENTRIES

Date	PROCEEDINGS
1971	
Oct 28	True Bill.
" 28	Motion and Order for issuance of Bench Warrant, filed. WARRANT EX
" 28	Bail fixed in the sum of $500.00 without surety.
Nov 1	Warrant returned, executed, filed.
Dec 10	Deft's motion to inspect Grand Jury Minutes and to extend time within which to move to dismiss, and memorandum in support, filed.
" 10	Defts motion for preliminary hearing and memorandum in support, filed.
" 10	Deft's motion for bill of particulars and memorandum in support, filed.
" 17	Appearance of Philip D. Lauer for George J. Wilson, Jr, filed.
" 20	PLEA: NOT GUILTY bail continued.
Dec 23	Deft's motion to dismiss indictment, filed.
1972	
Feb 4	Deft's memorandum in support of motion to dismiss, filed.
Feb 16	Government's reply to motion for bill of particulars, filed.
" 16	Government's memorandum in opposition to deft Wilson's motion to produce Grand Jury Minutes, filed.
" 16	Government's memorandum in opposition to motion for preliminary hearing, filed.

Date	PROCEEDINGS
1972	
" 17	Argued Sur: Motion for Preliminary Hearing—DENIED. Motion for Bill of Particulars—Now Moot. Motion for Production of Grand Jury minutes, etc, DENIED. Motion to Suppress Evidence, DENIED. Motion to dismiss Indictments, C.A.V. JD
Mar 14	Order that deft's motion to dismiss the indictment is DENIED, filed. 3/13/72 copies mailed 3/15/72 entered.
" 14	Hearing Re: Defts motion to reconsider Order denying his motion to dismiss the indictment, DENIED. Witnesses Sworn Deft's motion for waiver of Jury—DENIED.
" 14	Jury called but not sworn. JD
" 15	Jury Sworn, TRIAL.
" 15	Trial Witnesses Sworn.
" 15	Deft's motion for Judgment of Acquittal, Argued, C.A.V.
" 16	Trial Resumes:
" 16	Court denies deft's motion for judgment of Acquittal
" 16	Deft renews motion for judgment of acquittal, DENIED
" 17	Trial Resumes:
" 17	VERDICT: GUILTY same bail continued.
" 21	Order dated 3/17/72 directing Marshal to furnish lunch for 14 jurors, filed.
" 23	Deft's motion for new trial, filed.

Date	PROCEEDINGS
1972	
" 23	Deft's motion in arrest of Judgment, filed.
" 23	Deft's motion for judgment of acquittal, filed.
" 24	Deft's amended motion in arrest of judgment, filed.
" 24	Deft's amended motion for new trial, filed.
" 24	Deft's amended motion for judgment of acquittal, filed.
Aug 18	Transcript of March 15, 72, filed.
" 18	Transcript of March 16, 72, filed.
" 18	Transcript of March 17, 1972, filed.
" 18	Transcript of March 14, 72, filed.
" 24	Order that the notes of testimony having been transcribed and filed in the office of the Clerk, U.S. District Court, for the Eastern District of Pennsylvania is Ordered that the moving party's supplemental brief and or memorandum of law in the above captioned case be filed with this court within 20 days, and the opposing party file their reply brief etc within 10 days thereafter, filed. 8/25/72 entered and copies mailed.
Sep 20	Order dated Sep 19, 72 amending Order dated August 24, 1972, etc, filed. 9/21/72 entered and copies mailed.
1973	
Jan 16	Transcript of Feb. 17, 1972, filed.
Feb 5	Deft's brief in support of Post Trial Motions, filed.
Mar 6	Government's brief contra deft's post trial motions, filed.
Apr 19	Memorandum, Davis J. and Order that action is dismissed with prejudice, filed. 4/23/73 entered and copies mailed.

Date	PROCEEDINGS
1973	
May 10	Notice of Appeal, by the Government, filed.
" 10	Copy of Clerk's notice of appeal, sent to U.S. COURT of Appeals, filed.
" 16	Original Record transmitted to U.S. Court of Appeals.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 71-587

UNITED STATES OF AMERICA

vs.

GEORGE J. WILSON, JR.

CHARGE: Embezzling funds of a labor organization

Title 29 U.S.C. Sec. 501(c)

MOTION TO DISMISS INDICTMENT

TO THE HONORABLE, JUDGES OF THE SAID COURT:

The Petition of George J. Wilson, Jr., by his Attorneys Gus Milides, Esquire and Philip D. Lauer, Esquire, respectfully represents as follows:

1. That your Petitioner is the Defendant in the above captioned-matter;
2. That a Grand Jury has returned an indictment against the Defendant, said indictment having been filed on November 17, 1971;
3. That your Petitioner was not afforded a Preliminary Hearing or examination before a commissioner, either prior to the indictment or since that time;
4. That your Petitioner is without knowledge concerning the facts and occurrences upon which the indictment has been based;
5. That your Petitioner is without knowledge of, and has had no opportunity to gain knowledge of, the facts and circumstances surrounding the obtaining of the information upon which the indictment is based;
6. For the reasons set forth herein above, the Petitioner is without knowledge as to whether the evidence to be used against him has been obtained in accordance with constitutional standards;
7. That your Petitioner was arraigned on the within charges on December 16, 1971;

8. That, at the time of the said arraignment, on December 16, 1971, your Petitioners were advised, and therefore aver, that the government has been conducting an investigation of the acts upon which the indictment is allegedly based for a period of time in excess of four (4) years;

9. That your Petitioner believes and therefore avers, that the information upon which the indictment is based has been known to the government for a period of time in excess of four (4) years;

10. By reasons of the vagueness and uncertainty of the indictment, the Defendant has not been informed of the nature and cause of the accusations against him, all of which denies him the privilege of exercising his right to have compulsory process for obtaining witnesses, in his favor in that he is unable to ascertain the identity of necessary witnesses for whom process should issue; the indictment further denies the Defendant the assistance of Counsel for his defense in that Counsel is unable to determine the nature of the acts or transactions alleged with sufficient certainty to research the applicable law, cross-examine witnesses offered by the prosecution, or to otherwise prepare and try the case against this Defendant, all in violation of the Sixth Amendment of the United States Constitution;

11. That the unreasonable delay of the government in bringing the Defendant to trial is violative of the Defendant's rights as guaranteed by the Sixth Amendment of the United States Constitution, since Defendant was deprived of a "speedy and public trial", and since Defendant's Attorney has been prevented from effectively assisting the Defendant in the preparation of his case before trial;

12. That your Petitioner has previously filed motions for a preliminary hearing, to inspect grand jury minutes, and for a Bill of Particulars, answers to which have not been provided by the United States Attorney;

13. That the allegations contained in the indictment fail to state sufficient facts to constitute and offense against the Laws of the United States.

WHEREFORE, your Petitioner prays that the indictment be dismissed; or, in the alternative, that the Defendant be given additional time after the filing of answers by the United States Attorney to the motions previously filed within which to file additional and supplemental reasons for dismissal of the indictment.

GUS MILIDES, ESQUIRE

PHILIP D. LAUER, ESQUIRE
Attorneys for Defendant

COMMONWEALTH OF PENNSYLVANIA)
) ss:
COUNTY OF NORTHAMPTON)

Philip D. Lauer, being duly sworn according to Law, deposes and says that he is one of the Attorneys for the Defendant in this matter, that he is admitted to the Bar of the United States District Court for the Eastern District of Pennsylvania, and that the facts set forth in the foregoing motion are true and correct to the best of his knowledge, information and belief.

/s/ Philip D. Lauer
PHILIP D. LAUER

Sworn to and subscribed before me this ..... day of ....., 1971.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 71-587

[Filed Feb. 4, 1972, John J. Harding, Clerk,
By [Illegible], Deputy Clerk]

UNITED STATES OF AMERICA

vs.

GEORGE J. WILSON, JR.

CHARGE: Embezzling funds of a labor organization

Title 29 U.S.C. Sec. 501(c)

LEGAL MEMORANDUM
MOTION TO DISMISS INDICTMENT

It was early held by the U.S. Supreme Court that there were three (3) purposes of an indictment or information, which were listed therein as follows:

1. "To furnish the accused with such a description of the charge against him as will enable him to make his defense;"
2. To permit him to "avail himself of his conviction or acquittal for protection against the further prosecution for the same cause;"
3. "To inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, of one should be had. *U.S.* vs. *Cruikshank*, 92 U.S. 542, 558 (1876).

It is basic that every ingredient or essential element of the offense should be alleged, *U.S.* vs. *Debrow*, 346 U.S. 374 (1953), *U.S.* vs. *Krepper*, 159 S. 2d 958 (C.C.A. 3b, 1946), and it respectfully submitted that the fundamental purpose of the indictment is to inform the Defendant of the charge so that he may prepare for his defense, and that the test for sufficiency ought to be

whether it is fair to the Defendant to require him to defend on the basis of the charge as stated in the indictment. Scott, *Fairness in Accusation of Crime* 1957, 41 Minn. L. Rev. 509, 514-518, *U.S.* vs. *Seeger*, 303 F. 2d 478, 483 (C.A. 2d, 1962). It is equally basic that, in order to suffice as an indictment, that pleading must state facts and not conclusions of law. It is respectfully submitted that the instant indictment does not adequately inform the Defendant of the charge so that he may prepare his defense, in that it fails to allege the nature of the acts or transaction of the Defendant with sufficient certainty to allow him to adequately prepare his defense.

Defendant, in addition, has moved to dismiss the indictment on the grounds that the government's delay in bringing him to trial has resulted in deprivation of his statutory and constitutional rights. In *U.S.* vs. *Jasper*, U.S. District Court, Eastern District of Pennsylvania, Criminal No. 71-232, Judge Fullam dismissed an indictment on three (3) theories; the first two (2), the right to a speedy trial and the inherent power of the Court to dismiss a case for lack of prosecution, are implemented by Rule 48(b) of the Federal Rules of Criminal Procedure. *Pollard* vs. *United States*, 352 U.S. 354, 361 (1957). The third was the fifth amendment due process right of the Defendant not to be deprived of the ability to defend himself by unnecessary delays caused by the government. *Ross* vs. *United States*, 349 F. 2d 210, 216 (D.C. Cir. 1969). The Court cited two (2) recent third circuit cases in which the latter theory had been utilized viz., *U.S.* vs. *Childs*, 415 F. 2d 536 (3rd Cir. 1969); *U.S.* vs. *Feldman*, 425 F. 2d 688 (3rd Cir. 1970).

It is respectfully submitted that your Honorable Court has the power to dismiss the indictment by reason of the unreasonable preindictment prosecutorial delays of the government.

That there is prejudice to the Defendant appears obvious, since the passage of almost five (5) years since the alleged commission of the crime makes it virtually impossible for the Defendant to adequately prepare for his trial.

It is respectfully submitted, however, that no showing of prejudice is required, since the probability of prejudice in the instant case is so apparent. *Sheppard* vs. *Maxwell*, 384 U.S. 333, 352 (1966).

It is respectfully submitted that the instant indictment should be dismissed.

Respectfully submitted,

/s/ Philip D. Lauer
PHILIP D. LAUER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 71-587

UNITED STATES OF AMERICA

vs.

GEORGE J. WILSON, JR.

Before HON. JOHN MORGAN DAVIS, J.

Philadelphia, Pa., February 17, 1972

PRESENT:

WARREN D. MULLOY, ESQ.
for the Government
PHILIP LAUER, ESQ. and
GUS MILIDES, ESQ.
for the Defendant

Rod Maki
Court Reporter
Philadelphia, Pa.

[2] MR. MULLOY: Your Honor, I have a memorandum in opposition to the Defendant's Motion to Dismiss.

THE COURT: It is a little late to hand it to me. When do you expect me to read it?

MR. MULLOY: No, Your Honor, I apologize for its being late. I could have had it up here last night, I suppose.

THE COURT: That would have helped. At this point, I don't even have time to read it.

MR. LAVER: Would it perhaps assist the Court if I perhaps summarized what the issues are?

THE COURT: I think it might help me very much.

MR. LAVER: Thank you, Your Honor.

Subsequent to the indictment in this matter which was, if I may, approved on—filed on October 28th, 1971, we filed on behalf of Mr. Wilson the following motions for preliminary hearing, a motion for bill of particulars, a motion to product and inspect the Grand Jury Minutes and observe time to dismiss the indictment based upon what that might show, and a motion to dismiss the indictment which was subsequently filed by our office after an initial appearance here before the Court.

[3] With respect to the motion for a—

THE COURT: For the benefit of the Reporter, have you entered your appearance?

MR. LAVER: Philip Laver. I am appearing for Eastern Pennsylvania. I had entered my appearance.

THE COURT: I was speaking of the Reporter at this moment who wouldn't have recognized you.

MR. LAVER: And I have with me today, attorney Gus Milides, also from Eastern Pennsylvania who is a member of this bar and I believe Mr. Milides would also like to enter his appearance in this matter.

THE COURT: All right.

MR. LAVER: With respect to our motion for a Bill of Particulars, a Bill of Particulars was provided to us when we arrived in Philadelphia today. I quite frankly have not had an opportunity to review that. I read over certain of the requests made in my motion, were not answered by the Government. I am not aware at this time what our legal position on that would be.

THE COURT: Have you seen the memorandum in opposition to the Motion to Dismiss filed by Mr. Mulloy at this time? How long have you had it?

[4] MR. LAVER: I received the motion to dismiss, Your Honor, today at 2:00 o'clock when we arrived.

THE COURT: 2:00 o'clock when you arrived?

MR. LAVER: Yes, sir.

THE COURT: This comes as a surprise to you as well?

MR. LAVER: Yes, Your Honor, except to the extent I think it would be fair to say we were able to anticipate the government's position, but we had not seen any answers prior to today.

THE COURT: Mr. Mulloy, I would like to ask you a question.

MR. MULLOY: Yes.

THE COURT: When did this infraction of the law come to the attention of the U.S. Attorney's office?

MR. MULLOY: This infraction of the law, when is the first time we had a file on it?

THE COURT: Yes. When was it presented to your office?

MR. MULLOY: I honestly can't recall, sir. It is a matter that is part of a much larger case, or a larger investigation. There was a Grand Jury investigation, I guess [5] in the '70's somewhere which was conducted by the Strike Force and the file was subsequently returned to our office, the date of which I cannot recall. We had more investigation made—

THE COURT: Well, you see, the question of the date is very important here. They are asking to dismiss the indictment on the basis that he didn't get a proper trial as to immediacy.

MR. MULLOY: Your Honor, I had submitted in connection with, or attached to the Motion to Dismiss a copy of a Third Circuit opinion handed down Tuesday, and I have also cited the Marion Case, both of which state that preindictment delay or prosecutorial delay does not sustain a motion to dismiss.

THE COURT: Unless the Federal Attorney's Office has knowledge of this and is responsible for the delay.

MR. MULLOY: I think as I read the case, Your Honor, unless the defendant can show—

THE COURT: That it was hurt by it.

MR. MULLOY: —actual prejudice, Your Honor.

THE COURT: Yes, but in addition there must be a basis for dates.

[6] MR. MULLOY: As I read both the Marion Case and the Melnac Case which I attached, it does not go into the basis—for instance, in the Marion Case, as I

recall, the Government had gotten cease and desist orders some 2 to 3 years prior to the indictment, and the Court found that there was not sufficient to sustain a motion to dismiss unless there could be show particular or actual prejudice to the defendant. I think the test is now, Your Honor, both stated by the Supreme Court and by the Melnac decision, there must be actual prejudice.

MR. LAVER: Your Honor, for the Court's information, we are prepared to show actual prejudice at this hearing.

THE COURT: Are you going to present that now?

MR. LAVER: Yes, Your Honor. We are prepared to show, if I may do this by way of an offer to the Court, prepared to show that two essential witnesses for the Defense, one of those witnesses is dead. The second witness is, I believe, terminally ill at this point, and has had to seek extremely extraordinary treatment for his condition, and is practically comitose at this point. I might add to the Court the charge in the indictment is that of embezzling funds from a labor organization [7] that pursuant thereto, the Government has produced to us a check which was allegedly paid by the labor organization to a hotel in the City of Easton for expenses that the Defendant had incurred. The defendant was not a signatory to the check and the two persons about whom I am speaking were the signatories to that check, a gentleman by the name of Brinker and Mr. Schaefer both of whom were officers of the labor organization and signatories of that check.

Our proof through them would be, among other things to the effect that Mr. Wilson had no knowledge of the making of the check, was not aware of the purpose for the making of the check, had no authority to make the check, and so forth.

We are without either of those witnesses and I would submit to the Court that depending on upon what dates the Government is able to produce, had the prosecution been undertaken back in November of 1966 or shortly thereafter when the crime was alleged to have been committed, or 1967, we would have had these witnesses available, and that is the essence of our position with respect to that motion.

Of course, I would also urge upon the [8] Court the position that there is prejudice to the Defendant of a more intangible nature by his inability at this time to reconstruct the facts upon which the indictment is based.

THE COURT: You know, of course, that the Marion case stated very carefully that the due process clause may provide a basis for dismissing an indictment if the Defense can show at trial prosecutorial delay which prejudiced his right to a fair trial.

Now, I think this is a question for your showing those facts—

MR. LAVER: Yes.

THE COURT: —and if you can show those facts, I can take it under advisement.

MR. LAVER: May I have a moment?

Well, I should also point out to the Court that there is a very curious question at this time as to whether without these two witnesses the Government is in any position to proceed.

THE COURT: Well, that's another element entirely, and, of course, you might be able to force that out.

MR. LAVER: Yes. I should also point [9] out to Your Honor that in the process of preparing for today's hearing, a subpoena with duces tecum clause attached was served upon the F.B.I. agent who is the, we are advised, the agent involved with this investigation and we were told upon our arrival here today that that agent, Agent Joe Hargis of Allentown, has been instructed by the F.B.I. not to produce anything from his file. Obviously, we are not in a position to prove when the commission of the crime became known to the U.S. Attorney's Office, or to the F.B.I., and when all of the elements necessary to prove the crime came into their posession. We are not in a position to prove that without some access to Agent Hargis' or his file.

MR. MULLOY: I have not said Agent Hargis is prohibited from testifying. My position—

THE COURT: That's nice of you. After all, if he is subpoenaed, how could you prevent him from testifying?

MR. MULLOY: Your Honor, if he were to be called, our next order of business I was going to move to

quash the subpoena duces tecum under the grounds that under the instructions of the Attorney General, he is restricted from testifying—not from testifying, I'm sorry—

[10] THE COURT: I beg your pardon?

MR. MULLOY: From producing F.B.I. files. There are times, for instance, when we do produce materials from the files, but the Attorney General has instructed as specific regulations which appear in 28 CFR, a copy of which I have here, that regulate when material can be produced, and I have called the Attorney General's Office and I have talked to him, the person who is delegated to exercise authority, and he has said the material has been requested which is, by the way, the duces tecum which I saw this afternoon, reads "all the files."

I think what Mr. Laver is looking for can be obtained from a verbal interrogation of Mr. Hargis, the F.B.I. agent.

THE COURT: I don't think that would satisfy Mr. Laver.

What you are doing is laying a foundation for what happened down in Media when they broke in and stole the files.

Do you mean that in order to have a file of a Federal Governmental Agency you have to steal them, you are saying that a subpoena duces tecum won't be permitted?

[11] MR. MULLOY: I am saying the Government will not permit the wholesale turn-over of F.B.I. files because of the classified nature, the secrecy involved, and so forth.

If I may, Your Honor, I will hand up a copy of the pertinent part of the regulation, and these are regulations that have been in effect since—for some time and through the attorney who signed it, was Ramsey Clark.

THE COURT: I don't think a regulation of your Department of Justice has any possible bearing.

MR. MULLOY: This regulation—

THE COURT: What right do they have to make such a regulation? I don't recognize anything like that.

MR. MULLOY: This regulation was tested by the Supreme Court in United States—

THE COURT: You might give me the citation on that.

MR. MULLOY: Here is a copy of the Supreme Court Decision.

THE COURT: To me it is ridiculous.

Is this Department Rule No. 3229?

MR. MULLOY: It is the same rule, Your Honor, yes, sir. The rule reads the same and I believe it is the same rule.

[12] THE COURT: According to the form that you gave me, it is Rule 1612, etc.

MR. MULLOY: That is correct, Your Honor.

THE COURT: That doesn't sound like 3229.

MR. MULLOY: If it isn't the same rule—I'm sorry, Your Honor. It is now called Order No. 381-67, I believe.

THE COURT: In that I see no reference to either fact.

This opinion, of course, says, there is a supplement No. 2 to Order 3229 which states, "If questioned, the officer or employee should state that the material is at hand and can be submitted to the Court for determination as to its materiality, and whether in the public interest the information should be disclosed." I would be perfectly happy to go along with that, but I cannot have the Department of Justice without legal authority state that it will not do and its agent shall not abide by the orders of this Court. As long as the Department of Justice and its officers are reasonable and are willing to try to work out matters that are before me, I shall be more than happy to cooperate with them. But after all, the defendant's Constitutional rights are much more important than the question of a [13] regulation by the Department of Justice.

MR. MULLOY: Your Honor, I agree.

THE COURT: Just what do you intend to do about this case?

MR. MULLOY: Your Honor, I agree Agent Hargis may be produced and he can testify as to the investigation, as to dates and so on. What I object to is turning

over the F.B.I. files because they include first of all a lot of material that is irrelevant to this particular case.

Secondly, material with regard to informants and so forth.

Mr. Hargis can testify as to the investigation. For instance, the checks and so forth, the documents that we have here, which I have enclosed with the Motion for Bill of Particulars, he would testify to that he obtained in the Spring of 1969, that subsequently there was a Grand Jury investigation and as the investigation terminated, there was a request for additional information which he obtained.

THE COURT: Where is he now?

MR. MULLOY: Mr. Hargis is in the Courtroom today, Your Honor.

[14] THE COURT: Do you want to cross-examine the agent?

MR. LAVER: Yes, Your Honor. We would very much like to do that, Your Honor, without, if it can be accomplished in such a fashion, without prejudicing the defendant's rights.

THE COURT: All right.

MR. LAVER: Thank you, Your Honor.

Mr. Milides will question the witness.

JOE HARGIS, sworn

BY MR. MILIDES:

Q Your name, sir, is Joseph Hargis?

A Joe Hargis.

Q J-o-e?

A That is correct.

THE COURT: H-a-r-

THE WITNESS: g-i-s.

BY MR. MILIDES:

Q What is your position?

A I am a Special Agent with the F.B.I.

Q And, sir, how long have you been a Special Agent for the Federal Bureau of Investigation?

A Since 1961.

[15] Q Are you attached to any particular area?

A Allentown.

Q And how long have you been in the Allentown area?

A Since 1964.

Q Now, did there come a time, sir, when it became part of your duties officially or unofficially to make an investigation of the circumstances surrounding Mr. Wilson's arrest and indictment in this case?

A Yes.

Q And from whom did you receive the request to make the investigation?

A The request came from my office in Washington.

Q Would you refer to your records, sir, and tell us what date you received that request?

A The date I received the request would have been in April, 1968.

Q April of 1968?

A That is correct.

Q Was that the first request, formal or otherwise, that you received?

A I will have to qualify that answer because there may have been more than one investigation.

[16] Q I am concerned about the very first investigation by your department, sir, and your involvement in it?

A In my involvement in it?

Q That's correct.

A It would have no relation to this matter, but it would have been prior to 1968.

Q It would have been. When, sir, prior to 1968?

A I do not know the answer to that.

Q Now, sir, did anyone other than yourself from the Federal Bureau of Investigation, was anyone other than yourself involved in investigating this particular case?

A Oh, yes.

Q Was that before your involvement or after, sir?

A Well, again, I will have to qualify it because there would have been a number of agents from different places involved in the current investigation and possibly other agents involved in previous investigations.

Q I am concerned primarily with the investigation involved with the alleged embezzlement of union funds to the tune of $1,233.15.

To your knowledge, sir, how many agents of the F.B.I. investigated that particular charge?

A As far as I know, collecting information on that [17] particular charge, I believe I was the only one that collected data on that.

THE COURT: And you started when?

THE WITNESS: In—well, my first interviews on that case was in June, 1968.

BY MR. MILIDES:

Q June of 1968?

A That is correct.

Q Now, how many people did you interview in your investigation?

A Well, you got to understand this was not just on this particular thing because I interviewed people on a whole range of things—

Q Excuse me, Mr. Hargis.

My question to you, sir, and I will put it to you again, was with respect to this specific charge, how many people, sir, did you interview?

You may refer to your records.

A I do not have any records with me.

Q Do I understand, sir, you didn't bring the records with you in spite of the subpoena duces tecum?

A That is correct.

Q So then, sir, what you are relying on in your recollection—

A That is correct.

[18] Q —with respect to any of the questions I am going to ask you?

A That is correct.

Q All right.

Now, sir, name, if you will—give us the number, if you will, sir, of the witnesses that you investigated with respect to this alleged embezzlement charge?

A I would estimate a half a dozen.

Q Can you tell us when you saw the first witness?

A In June, 1968.

Q And what was the name of that witness?

A I believe that was Jean Zippel from the union office.

Q Was she the secretary at the time of the union office?

A Yes. That is correct.

Q And your interview led you to another witness, second witness?

A I cannot answer your question directly because things did not happen in the order that you apparently presume they did.

Q Excuse me—

A I reveiced a copy of a check from Mrs. Zippel in June, 1968.

Q Okay.

[19] MR. MILIDES: May I have it marked?

Would you mark it?

THE COURT: May I see it?

(Counsel hands to the Court the document.)

(Exhibit D-1 was marked for identification.)

BY MR. MILIDES:

Q Let me show you, if I may, Defendant's Exhibit No. 1 and ask you if that is the copy of the check that you received from Mrs. Zippel?

A That would be a copy of the same check.

Q And you received that, again, when, sir?

A I believe it was in June, 1968.

Q Now, would you records reflect more accurately when you actually received it?

A Probably.

Q Did you make any notation on the exhibit itself, on the original?

A No.

Q As to when you received it?

A No.

Q Then, as a result of your getting that check, did you then interview someone else?

A Yes.

[20] Q Now, when and who was that?

A I don't recall the exact date, but I conducted several—made several contacts at the Hotel Easton.

Q How long after receipt of that check did you then g to the Hotel Easton, the payee of that exhibit?

A I went there several times. I don't know the exact date off-hand. But it was between June '68 and June '69. I did not eventually get the information I was after until a year later.

Q You cannot tell us specifically how many times you were there?

A No. I was there several times.

Q Would your records reflect that?

A They probably would.

MR. MILIDES: Your Honor, please, I would move to—

THE COURT: I don't see the importance of it. I think you should proceed to request later on if we need the records, we will bring it up then. At this point, I don't think that anything can be added by finding out whether he made calls on this, this and this date. I think [21] you have just got to operate on what you have at the present moment.

MR. MILIDES: I will do the best I can.

MR. MULLOY: If I may be of some assistance when he requested the copy of the checks, there are dates on there, if you want to show them to him, up in the top corner.

MR. LAVER: Would the Court indulge me for one moment?

BY MR. MILIDES:

Q You interviewed, I believe you said, the Hotel Easton or the responsible persons at the Hotel Easton.

Do you recall their names?

A One was Mr. Curcio and the other one was Mr. Rumbouch.

Q Who else did you interview?

A I probably talked to some of the clerical people there, but I don't recall their names.

Q Would that be at the same time?

A Probably at the same time or sometime when I rechecked to see whether information was available.

Q And who else did you interview?

A Regarding this particular aspect of the case?

Q This is the only aspect, sir, I have reference to.

[22] A I probably talked to Mr. Schaefer at the Union.

Q Are you sure of that, sir?

A I talked to Mr. Schaefer in June, 1968.

Q In June of '68?

A June '68, I believe it was.

Q Was that the same time that you received the check from Mrs. Zippel?

A I believe it was. I think I talked to him on 2 or 3 occasions about that time.

Q About the same time?

A Right.

Q In the same month?

A It would have been within a couple of weeks of each other.

Q And you talked to Mr. Schaefer.

Who else did you talk to?

A I believe that's all.

Q So would it be a fair statement, Mr. Hargis, to say that in June of '68 you undertook this investigation and that you were the only person assigned to this investigation with respect to this aspect of it?

A I believe that was the only one that did any work on this aspect.

[23] Q Would it be a fair statement in furtherance of your investigation you met with Mr. Schaefer who was a maker of that exhibit, Defendant's Exhibit No. 1, you talked also to the secretary, and you also talked to the payees or the people of the Hotel Easton who would be the payee on the check?

A That's correct.

Q And you did that at or about the same time, June, July, August of '68?

A No. At the Hotel Easton I said that ranged over a period of a year.

Q All right. Now, was it a matter of scheduling, is that the problem, was that what caused the delay?

A I don't believe there is any delay. As a matter of fact was, I could not find the information or the people at the Hotel Easton could not find the information I was looking for.

Q As I understand it, you spoke with Mr. Rumbough?

A That is correct.

Q Who is one of the owners of the hotel?

A I believe he is a manager.

Q And you talked to Mr. Curcio?

A Right.

[24] Q And you talked to some of the clerks or the employees?

A That is correct.

Q And you had received the check in June of '68, and your next order of business was to go to the people who ultimately surrendered the check for payment?

A No, that was not the next order of business. As I said, there was—this was quite an extensive investigation and everything was done in order that I could get to it at that time.

Q I asked, sir, who else did you interview other than Mr. Rumbough, Mr. Curcio, the clerk and Mrs. Zippel and Mr. Schaefer?

A I asked pertaining to this particular aspect—

Q Only this aspect, sir?

A That was my answer. I gave you the answer.

Q Well, what you mean is this case only, isn't that correct?

A And the whole case in our office. I interviewed probably numerous people. I don't know how many.

Q Okay. Now, you say that in around June of '69 your investigation was completed?

A No, I did not say that.

Q Well—

A I said in relation to this particular aspect, I received [25] the information I was after from the Hotel Easton about June, 1969.

Q What happened next with respect to this case?

A With respect to this case, we continued the investigation.

Q Whom did you see?

A There were numerous people we saw.

Q Give us some names, sir, give us some dates, if you will?

MR. MULLOY: I will object, unless the witnesses have something to do with this particular offense.

THE COURT: He has stated to this witness that he is to restrict himself to this particular event. Now, there can be no question of that. This is what has been said to the witness and you will understand that.

Now, you will proceed to answer the questions on the basis that they are presently tied in with this particular event.

Now, you may proceed.

MR. MILIDES: Thank you, Your Honor.

BY MR. MILIDES:

Q In June of '69 you received the information from the Hotel Easten that you desired?

A Yes.

[26] Q Although it took you approximately one year to get it?

A That is correct.

Q Okay. What happened next with respect to this investigation?

A With respect to this particular thing?

Q This is all I am talking about, Mr. Hargis.

A It would have been the indictment.

Q The indictment.

Now, in June of '69, did you then meet with someone from the U.S. Attorney's Office to present your evidence to them?

A Not concerning this particular thing, I don't believe.

Q Well, your investigation was complete in June of '69, no mistake about that, correct?

A Yes, regarding this.

Q Okay. Are you aware, sir, that 3 days before the running of the Statute of Limitations that information was presented to the Grand Jury?

A Yes.

Q Did you present that information?

A Yes, I did.

Q Now, sir, do you account for the delay from June '69 to October 28, '71, from the time your investigation was [27] completed to the time of the presentment of that evidence before the Grand Jury in this courthouse?

A Because this was part of a larger investigation. That's all I can tell you. That was not completed at the time this particular aspect was complete.

Q Did your investigation, sir, disclose that Mr. Brinker had died?

A Yes.

Q And he was one of the makers of the check?

A That is correct.

Q And you didn't interview Mr. Brinker, did you?

A No.

Q You did not. And has your investigation revealed that Mr. Schafer is in extremis, if I can use that word, is suffering from a terminal condition with perhaps a life expectancy, say, of hours?

A No. No.

Q After you had completed your investigation, did you talk to your superior?

A Well, I do that every day, practically.

Q Did you—

THE COURT: You understand, Mr. Hargis, that you are talking about a single item. This case turns on that [28] point.

Now, you will answer the questions propounded to you in relation to this case.

THE WITNESS: Yes, sir.

THE COURT: But you haven't so far. Now, please stick with this one case. Don't tell us, "Yes, I talked to my superior every day." Well, who cares on various matters, but when the question was asked of you, when did you talk to your superior about this case.

THE WITNESS: Your Honor, I don't know that.

THE COURT: Can you give us your best recollection?

THE WITNESS: I just don't know, Your Honor. I don't know what date it would have been because I have obviously talked to him several times on it.

BY MR. MILIDES:

Q June of '69, your investigation was complete. Did you talk to anyone in the U.S. Attorney's Office with respect to the prosecution, the preparation of an indictment in this particular case?

A Yes.

Q When was that, sir?

A I don't know the exact dates. I talked to people in the United States Attorney's Office and in the Strike Force [29] Office several times.

Q When you say the Strike Force Office, that is a branch of the U.S. Attorney?

A That is correct.

Q Can you recall how long after June of '69 you spoke with for the first time to anyone representing the government in the U.S. Attorney's Office?

A Well, It would have been between June, 1969 and probably December of 1969.

Q It was within 6 months after you had completed your investigation?

A That is correct.

Q And that was the first time you had spoken with anyone in the U.S. Attorney's Office?

A No, it was not.

Q When was the first time, that is what I am asking you, sir?

A The first time would have been before I started the investigation.

Q Would that have been prior to '68?

A No, that would have been in '68.

Q Prior to June of '68?

A It would have been between April and June, 1968, would have been the first time I talked to anyone.

[30] Q When was the first time after you had completed your investigation you spoke to anyone in the U.S. Attorney's Office about this case?

A I believe the case at that time was in the Strike Force Office of—your including them as part of the U.S. Attorney's Office—it would have been in the latter part of 1969.

Q And you spoke to them in the latter part of '69, and did you speak to them again?

A Yes.

Q When was the next time you spoke to them?

A Well, it would have been early 1970 because that is when we had a Grand Jury investigation regarding that matter.

Q Did you appear before that Grand Jury with respect to that case?

A No, I did not.

Q There was a Grand Jury that had been convened?

A That is correct.

Q And in 1970, in the beginning you say you talked to the U.S. Attorney's Office in June, July or during that period of time. Did you again talk to the U.S. Attorney's Office with respect to this case?

A In 1970.

[31] Q Yes.

A Yes, that would have been—it would have been right before the Grand Jury. I talked to them about the whole thing, not only about this, but several other things.

Q You did not provide any information, more information to the U.S. Attorney's Office because your investigation had been completed, isn't that correct?

A That is correct.

Q All you did was digest, if I may use that word, what evidence you had gathered or whatever testimony you had?

A That is right.

Q And now we are talking about June of '70 and how about towards the latter part of '70. Did you again talk to the U.S. Attorney's Office concerning this case and its existence?

A In the latter part of 1970?

Q Yes.

A Well, it would have been—yes, during 1970.

Q You said the beginning of '70, you indicated perhaps in the middle of '70 and I am asking now towards the end of '70, did you again discuss it with the U.S. Attorney's Office?

A Yes, I would have.
[32] Q How about in the beginning of '71, did you discuss it again?
A Yes, that is right.
Q How about in the middle of '71?
A That is right.
Q Were you aware when the Statute of Limitations was to expire in this case?
A Yes.
Q And that to your knowledge was when, sir?
A Sometime in November, 1971.
Q November 1st, 1971. Were you then asked by the U.S. Attorney's Office to present yourself before a Grand Jury?
A That is correct.
Q And that was when, sir?
A In October.
Q And that was October 28th?
A That is probably correct.
Q It was the Thursday before the Monday that the statute was going to expire, isn't that correct?
A That would be about right.
Q Now, were you the only person that appeared before the Grand Jury?
MR. MULLOY: I will object, what went on before the Grand Jury.
[32] THE COURT: I don't think this is within the knowledge of this witness.
MR. MILIDES: I withdraw the question, Your Honor.
THE COURT: Thank you.

BY MR. MILIDES:

Q When did Mr. Brinker die, sir? The maker of the check.
A I believe it was some time prior to June of '68. I believe he was deceased at the time I was there.
Q Before '68, June of '68?
A I believe so. I am not absolutely positive, but sometime while I was over there, I asked about his whereabouts and it was informed he was deceased.
MR. MILIDES: No further questions.

BY MR. MULLOY:

Q To put some of these dates in focus, Mr. Hargis, when you received an exhibit, or a potential exhibit or potential piece of evidence, do you make any marking on it?
A Yes. I usually put my initials on it and the date I obtained it and the file number down.
Q I will show you an attachment to the Government's reply to the motion for Bill of Particulars and ask you if [33] they are copies of the matters or documents you received? You can tear it apart if you wish, Mr. Hargis. Is there a copy of your initials at the top of those documents?
A Yes.
Q And there is a date there on each document. What does the date indicate?
A That would be the date I obtained it.
Q Would you look at each one of those documents and tell us what the date was that you obtained it, describe the document?
A First is a copy of this check which I initiated and looks like March 1969.
Q Does that refresh your recollection as to when you received the check?
A Yes, that would have been the date I received that particular check.
THE COURT: That check with your initials, what is the day?
THE WITNESS: March, 1969. The day on this copy is marked out, Your Honor, with a hole through it.

BY MR. MULLOY:

Q Is that the same check, copy of the same check as the D-1?
[34] A Yes, it is.
Q Would you go on the next document attached, copy of the next document attached to the Motion for Bill of Particulars?
A I have a ledger card from the Hotel Easton which I initialed September 27, 1968. I have a copy of the

city ledger payments for November 3, 1966 from the Easton Motor Hotel which I initialed March 17, 1969.

I have a copy of the ledger card from the Hotel—Easton Motor Hotel which I initialed April 3, 1969.

I have a copy of the guest check from Easton Motor Hotel which I initialed April 3, 1969.

And I have a copy of an application for Marriage License which I initialed in June, 1969.

Q And those dates would be the dates you received the originals of those documents?

A That is correct.

Q We have talked about a larger investigation and investigation with regard to this particular offense.

Was there a larger investigation going forward throughout this whole time?

A Yes.

[35] MR. MILIDES: I am going to object to this. It is beyond the scope of the direct examination.

THE COURT: Well, I think you did bring out the fact that there was a larger investigation going on, so I wouldn't say it is beyond the scope.

MR. MILDES: I would say, Your Honor, it would not be relevant or material to the scope and purpose and the purview of this particular hearing.

MR. MULLOY: The only thing I wish to demonstrate is there was an on-going investigation. It started before the facts that result in this indictment and continued beyond the facts.

THE COURT: I will overrule your objection.

BY MR. MULLOY:

Q There was a larger investigation?

A Yes, sir, there was.

Q Can you tell me when it started, just vaguely, not approximately?

A The entire investigation would have been started in April, 1968 and I conducted the first interviews in June, 1968.

Q When did the entire investigation, I am talking about the overall scope now, when did it end?

[36] A July, 1970.

MR. MULLOY: That is all the questions I have.

THE COURT: Any redirect?

BY MR. MILIDES:

Q Mr. Mulloy took you through the various documents. There were no documents received by you subsequent to or after June of '69, isn't that correct?

A These documents here, no, that's right.

Q The exhibits—

A June, '69.

Q The exhibits that are attached to the Bill of Particulars?

A That is correct.

Q Now, this investigation that you made reference to didn't only involve Mr. Wilson, it involved a variety of people, did it not?

A Involved one other person.

Q One other person.

MR. MILIDES: That's all.

THE COURT: Would you mind telling me where your initials are on this particular check?

THE WITNESS: My initials do not appear on that check, Your Honor.

[37] THE COURT: You testified—

THE WITNESS: I have a copy of it here that I assume that it is the same check. Here are my initials.

THE COURT: Your initials are way up there?

THE WITNESS: Yes.

THE COURT: They are not on the check.

THE WITNESS: They are not on the check. This is the way I got it, Your Honor, like this.

THE COURT: Oh, I see.

THE WITNESS: And I put my initials on the copy that I got.

THE COURT: Thank you.

Anything else?

MR. MILIDES: Nothing further, Your Honor.

MR. MULLOY: Nothing further from this witness.

MR. MILIDES: I would just like to, if I may make a statement—

THE COURT: You may.

MR. MILIDES: Perhaps, if Your Honor, please, perhaps all of this may be academic and I say this in all earnestness, and I say this most respectfully to Mr. Mulloy and to the Court, and I think that someone said that we [38] reach a point perhaps in life where you cannot deny the multiplication tables. If the Government cannot make out a cause of embezzlement, and we are talking about specific intent and all the elements and the appropriation that is required to make out a case of embezzlement, they are going to have to show some authority of control by Mr. Wilson over the makers of those checks. If these people aren't available the Government's case falls completely apart. Then why are we wasting this court's time and the available time of the defendant and everyone involved? I would respectfully suggest that the—

THE COURT: I think counsel should get together and find out what they have here and what should be done.

But at this point, I will deny your petition for a suppression of evidence.

MR. MILIDES: Thank you, Your Honor.

If Your Honor, Please, I would like perhaps to show, and I don't know whether it is necessary for the record, I have one other witness to show the illness of Mr. Schaefer and his condition.

THE COURT: I think you statement is enough. There has been no denial of the fact, so that I would [39] not think that there is any reason to worry about that.

MR. MILIDES: Thank you, Your Honor.

MR. MULLOY: If I may, I can assure you that in light of the statement that Mr. Schaefer is ill, I wouldn't deny, and we certainly intended to use him and we will review our evidence and—

THE COURT: I think the answer to it has to be a conference between counsel for the defense and counsel for the United States Attorney's Office.

MR. MULLOY: All right.

MR. MILIDES: Thank you very much, Your Honor.

THE COURT: I would think you might be able to reach a stipulation as to this entire matter and submit

it to the Court and I shall be very happy to carefully consider it.

MR. MILIDES: Thank you, Your Honor.

THE COURT: You're Welcome.

MR. LAVER: If I may, as the court knows, three other motions were before the court included in which—

THE COURT: You were withdrawing them, were you not?

MR. LAVER: I was not. I was saying to the Court that the Motion for Bill of Particulars had been [40] answered, and that the Motion for Preliminary Hearing and that the Motion for a Production of the Grand Jury's Minutes would not require any testimony at this time, since the specific—

THE COURT: I would deny that motion anyway. I don't think you have any right to ask for it, so that I think if you will sit down and confer on this point, you may be able to work out all the facts and those you can't work out, I will be glad to decide.

MR. LAVER: Thank you, Your Honor.

(Whereupon, the hearing was adjourned at 4:10 o'clock p.m.)

I Certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

Date Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 71-587

UNITED STATES OF AMERICA

vs.

GEORGE J. WILSON, JR.

Before HON. JOHN MORGAN DAVIS, J., and a jury.
(Two alternates.)

Philadelphia, Pa., March 14, 1972
11:32 A.M.

PRE-TRIAL HEARING

Elizabeth P. Mensch
Official Court Reporter
3051 United States Courthouse
Philadelphia, Pa. 19107
WA 5-9480

[2]
PRESENT:

WARREN D. MULLOY, ESQ.
Assistant United States Attorney
for the Government.
PHILIP D. LAVER, ESQ., and
GUS MILIDES ESQ.
for defendant.

THE COURT: This is a pre-trial hearing relative to the request of counsel for me to reconsider my motion denying the dismissal of the indictment in the case of United States versus George J. Wilson, Jr.

MR. MULLOY: Your Honor, if I may make a statement. I understand that your Honor is concerned because one of the primary factors in this case and in the Government's proof of this case will be a check payable to the order of Easton Motor Hotel in the sum of $2,024.09, dated November 1st, 1966, and that it is from this check that the Government contends that the wedding expenses of the defendant, Wilson, were paid, or wedding expenses of the defendant, Wilson's, daughter were paid to the Easton Motor Hotel. The people who signed the check—or, this check is drawn on International Brotherhood of Electrical Workers, Local No. 367, and the people who signed this check are Robert Shaffer and a Brinker. I can't make out his name, Robert L. Brinker.

[3] Mr. Brinker is dead. He had died even prior to the time of our investigation, and Mr. Shaffer is terminally ill and is not able to testify.

Your concern is, as I understand it, that the defendant here might be prejudiced by the failure of the Government, or the inability of the Government, to produce these two parties signatory to the check, and the Government will attempt to prove at this hearing that, whether they were here or not, their testimony would really add nothing to the case, and that our inability to produce them is not prejudicial to the defendant.

THE COURT: Thank you.

MR. MULLOY: With that, I would call Mrs. Sippel please.

JEAN D. SIPPEL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MULLOY:

Q Mrs. Sippel, what is your address?
A My home address?
Q Yes?

A 402 Old Mill Road in Easton.
Q And by whom are you employed?
A IBEW Local Union 367 in Easton.
Q In what capacity are you employed by them?
[4] A As office secretary.
Q How long have you been employed as office secretary?
A Since October of 1966.
Q Who hired you as office secretary?
A Mr. Wilson.
Q The defendant?
A Yes.
Q As office secretary, is one of your functions to prepare checks on the Union Account for signature?
A Yes.
Q Have you at my request brought with you a check today dated November 1st on the union account payable to the order of Easton Motor Hotel?
A I have.
MR. MULLOY: May I have the check please?

(Check handed to counsel.)

MR. MULLOY: Will you mark this please?

(G-1, being a check, marked for identification.)

(Exhibit G-1 shown to Court and to defense counsel.)

BY MR. MULLOY:

Q Now, there has been identified or marked for identification a check marked G-1. Will you describe that check please?
A It is check No. 7390 drawn on the general account of the local union at Easton National Bank and Trust Company in Easton.
[5] Q And it is signed by whom?
A Robert J. Shaffer, as president, and Robert L. Brinker as treasurer.
Q And you said local union, I take it that is local 367 of the IBEW?
A Yes.
Q And the check is payable to whom?

A Easton Motor Hotel.
Q In the sum of?
A $2,024.09.
Q Now, Mrs. Sippel, at that time was anyone else preparing checks on the union account?
A No.
Q You were the only one who did that?
A Yes.
Q Did you prepare that check?
A Yes, I did.
Q Would you describe the procedure involved in preparation of that check?
A Of this particular check?
Q Of that particular check, yes?
A Weekly we were issuing checks on the general account and each week—
THE COURT: How many checks do you issue in a week?
[6] MRS. SIPPEL: It varies. There are anywhere from two to four general payroll checks, and then incidental expenses for office supplies, rent, the usual expenses.
THE COURT: Do you have any idea how many checks in a week?
MRS. SIPPEL: I would say it would average maybe ten over a period of a year.
THE COURT: Ten a week average over a year?
MRS. SIPPEL: I would say yes. Some weeks more, some weeks less.
THE COURT: Over that year would you have many checks written to the Easton Motor Hotel?
MRS. SIPPEL: No.

BY MR. MULLOY:

Q Do you have any idea how many checks you did write to the Easton Motor Hotel?
A I don't recall.
Q Did you write more than that one?
A It's quite possible I did. I truthfully don't remember.
Q Would you describe the procedure insofar as that check is concerned?

A Each week Miss Hunt from Easton Arms office—
Q You had better tell us who Miss Hunt is or who Easton Arms is?
[7] A Easton Arms is a non-profit corporation formed for the purpose of administering the apartments known as Kennedy Garden Apartments in Easton, Pennsylvania, completely separate from the local union.
Q And what was Miss Hunt's relationship to Easton Arms?
A I assume she was secretary. She ran the office.
Q You started to say each week Miss Hunt did what?
A Each week Miss Hunt would come to our office with a hand written list of checks that were to be issued on the general account which were—
Q On the general account of the union?
A Yes, for the account of Easton Arms, and there were being listed on a separated ledger account, a running account, which was in the future to be repaid.
Q Repaid by whom?
A By the corporation, Easton Arms, Inc., to the local union.
Q What is Miss Hunt's full name?
A Gloria Hunt, as far as I know.
Q Did anybody else bring over a list?
A No, it was generally her.
Q It was generally her?
A Sometimes she telephoned it in from the office.
THE COURT: What was her capacity?
MRS. SIPPEL: She was secretary of the Easton Arms corporation.
[8] THE COURT: And that operated the—
MRS. SIPPEL: Kennedy Gardens Apartments.
THE COURT: Kennedy Gardens Apartments.

BY MR. MULLOY:

Q Did Mr. Burke ever bring over the list?
A He sometimes added in his writing to the list, but he never personally brought one in. I don't recall that he did.
Q I see, all right. What did the list have on it?
A Simply a list of checks that were to be issued on

this advance account, the names to whom they should be issued and the amounts.
Q Did it have any justification or reason why the checks should be issued?
A There were no supporting documents with it, no.
Q And upon receiving this list, what did you do?
A I issued the checks.
Q You mean you typed the check?
A Yes.
Q Having typed this check which you typed, G-1, in the typewritten form that it is, what did you do with it?
A They were all then put in a folder awaiting signature of the officers once a week.
Q And you submitted them to the officers for signature?
[9] A They were in the folder, yes.
Q Were there any supporting documents with the check at the time they were submitted to the officers for signature?
A No, just the handwritten list.
Q You gave them the list. Was there a voucher that accompanied the check?
A They issued vouchers at the same time that I issued the checks.
Q What did the voucher have on it?
A Identically the same as the check, re Eastern Arms.
Q Do you recall that either of the officers questioned this check?
A No, I don't.
Q After they had the check what did you do with it? After they signed it what did you do with it?
A I disbursed all checks to the people they were made payable to and any for the account of Easton Arms were returned with the handwritten list to Miss Hunt.
MR. MULLOY: That's all the questions I have.
THE COURT: Cross Examine.

CROSS EXAMINATION

BY MR. MILIDES:

Q As I understand it, you were hired as secretary for the IBEW [10] sometime in October of 1966?

A Mid October, yes.

MR. MULLOY: May I interrupt one minute. I have one more question I would like to ask, and that question is, Mrs. Sippel, you say you drafted checks from a written list supplied by Gloria Hunt. What authorization did you have to write checks from a list submitted by Miss Hunt?

MRS. SIPPEL: I was told at the time I was hired that the union was advancing funds to get the corporation established and on its feet, which would be repayable at a later date, and that each week a list would be submitted and were to issue the checks and keep a separate ledger sheet of that amount.

MR. MULLOY: You say you were told by whom?

MRS. SIPPEL: Mr. Brinker at that time told me that had been the procedure.

MR. MULLOY: Did you tell me earlier in my—

MR. MILIDES: Objection, if your Honor please. He is now seeking to cross examine his own witness.

THE COURT: Well, I will rule. You should at least have him state his question before you object. I don't know what the question is really.

MR. MILIDES: He is asking about a prior statement.

THE COURT: How do I know what he is asking and why don't [11] you let him ask his question, but remember, Mrs. Sippel, where there is an objection you must wait until I rule on it before you answer it. Now, suppose you ask your question.

MR. MULLOY: Thank you, your Honor. Mrs. Sippel, was Mr. Brinker the only one who told you to prepare checks from a list submitted by Mrs. Hunt?

MRS. SIPPEL: I don't recall that anyone specifically told me. I was just told this had been the established practice and, as far as I recall, Mr. Brinker was the only one who personally told me.

MR. MULLOY: Just about an hour ago did you discuss your testimony with me in my office?

MRS. SIPPEL: Yes.

MR. MULLOY: Do you recall I asked you the same questions?

MRS. SIPPEL: Yes.

MR. MULLOY: Do you recall your answers?

MR. MILIDES: Objection.

THE COURT: Objection sustained.

MR. MULLOY: I have no further questions.

BY MR. MILIDES:

Q You undertook your position with the IBEW in October of 1966?

A Yes.

Q And, as I understand it, Easton Arms was a nonprofit corporation organized for the purpose to provide housing for the [12] elderly, is that correct?

A Yes, as I understand it.

Q Right, and the housing, the name of the housing project was Kennedy Gardens?

A Yes.

Q And, as I understand your testimony, Mrs. Sippel, the arrangement was that the IBEW had a bank account in the Easton National Bank and Trust Company?

A Yes.

Q And that was the general fund for the union monies, is that correct?

A Yes.

Q But, in addition, not only were monies drawn from that account for union purposes, it was also, monies were drawn from Easton Arms?

A Yes, that's right.

Q Which was, and the IBEW was the sponsoring organization for Easton Arms, is that correct?

A That's correct, yes.

Q And it was the practice then that the monies in the Easton National Bank and Trust Company will be drawn upon for Easton Arms purposes, isn't that correct?

A Yes.

Q And in your experience at that time, and even after

that time, [13] there were numerous functions held by Easton Arms which were paid for out of the Easton National Bank account, isn't that correct?

A That's correct.

Q Now, there was, do you recall a function which was held at the Circlon Restaurant?

A Not specifically.

Q Do you recall making a check?

A I remember writing the checks, I don't remember the function specifically.

Q Do you know approximately how many checks you issued or caused to be, that you drew up with respect to functions that occurred in the promotion of Easton Arms and Kennedy Gardens?

A I have no idea.

Q Do you recall making other checks to the Hotel Easton?

A I believe there may have been some. I wouldn't state positively whether there were or not.

Q Do you recall making a check to the Scandinavian Inn?

A Not specifically, but there may have been one.

Q Do you recall—did you attend any of the promotional meetings or the promotional gatherings with respect to Easton Arms?

A No, my function had nothing to do with that corporation.

Q Do you recall making any checks payable to the Hay Adams [14] Hotel in Washington, D.C.?

A Yes, sir.

Q And was that with respect to Easton Arms?

A Yes, sir, it was.

Q The Robert Treat Hotel In New Jersey?

A Yes, sir.

Q The Military Park Hotel?

A That I don't remember.

Q The Essex House in Newark?

A I don't recall that either.

Q Now, when the Federal Bureau of Investigation, through Mr. Hargis, inspected your records did you

show him that ledger sheet which was charged against Easton Arms?

A Yes, he received it.

Q And he reviewed it, and did he make copies of it?

A Yes, sir.

Q And can you tell us how much monies was expended from that account and charged against Easton Arms?

A The local union is now carrying a sum in excess of thirty five thousand dollars for the credit of Easton Arms.

Q And that entire list, the list of all the expenditures, was given to Mr. Hargis?

A Yes, sir.

Q Now, Mr. Wilson specifically did not tell you to make payment [15] of a check to the Easton Motor Hotel in the sum of $2,024.09, did he?

A He did not specifically order me to issue that check, no.

Q Now, can you tell us what other checks you issued at the time you issued this check?

A Not without my records I couldn't, no.

Q Would you look at your records please?

A I don't have any other records with me.

MR. MILIDES: I have no further questions. Thank you.

REDIRECT EXAMINATION

BY MR. MULLOY:

Q Mrs. Sippel, you say that the account now stands, Easton Arms account now stands at thirty five thousand dollars?

A Slightly in excess, yes.

Q Was any money ever paid back from Easton Arms to the union?

MR. MILIDES: If your Honor please, it is objected to. I don't see the relevance.

MR. MULLOY: It must be relevant. You raised the question as to the—at least it must be relevant in your mind. I just want to clarify no money ever went back to the union.

THE COURT: I think that is a legitimate question. I will permit it.

MRS. SIPPEL: No.

[16] BY MR. MULLOY:

Q No monies were returned to the union?

A No.

Q Mr. Milides asked you about numerous checks and functions. Were you familiar with what any one of these checks for Easton Arms was going for?

A Not specifically, except they were doing a lot of publicity work in advance of opening the apartments with city officials, county officials, various agencies who would be affected, Redevelopment, and so forth. They were doing a lot of entertaining and advertising.

Q But, for instance, a check to, what did he say, the Circlon Restaurant or something?

A Yes.

Q Did you have any idea what the check was used for, whether it was for meals or what?

A I assumed another meeting for publicity purposes.

Q But you really don't know?

A No, I don't.

Q Your sole function, as I understood your testimony, was merely to prepare checks from the list?

A That's right.

Q Who described your duties to you at the time you were hired?

[17] MR. MILIDES: I object to this question. It is repetitious.

THE COURT: I will permit it. Go on.

MRS. SIPPEL: Mr. Wilson hired me to come into the office and I was put under the immediate supervision of Mr. Brinker who was actually in the office at the time.

BY MR. MULLOY:

Q What was Mr. Wilson's title at that time?

A He was business manager.

Q Of the local?

A Yes.

THE COURT: What was Mr. Brinker's title?

MRS. SIPPEL: He was treasurer at the time.

BY MR. MULLOY:

Q Did Mr. Wilson ever have another title?

A In this particular local the capacity of business manager and financial secretary are combined.

Q Who was really in charge of the office, in charge of the union?

MR. MILIDES: Objection.

THE COURT: Overruled.

MRS. SIPPEL: I would say Mr. Wilson.

[18] BY MR. MULLOY:

Q And who was authorized at that time to sign checks on the union account?

A The two officers required on signature of any checks are the president and the treasurer.

Q They were the only two?

A Yes.

MR. MULLOY: Thank you.

RECROSS EXAMINATION

BY MR. MILIDES:

Q You said that there were publicity campaigns going on at this time as far as for the promotion of Kennedy Gardens?

A I understood they were doing a lot.

Q And did it involve to your knowledge city council, members of city council?

A To my personal knowledge I was not involved in any of it. I don't know for certain.

Q You did mention, however, you thought the redevelopment authority and other local politicians?

A I know they said they were doing a lot of publicity, entertaining, that's what I was told.

Q And that was at that time?

A Yes.

MR. MILIDES: That's all.

[19] MR. MULLOY: I have no further questions.

THE COURT: Thank you.

(Witness leaves stand.)

MR. MULLOY: Your Honor, I have nothing further to offer with regard to this point. The point I think the testimony makes is that a list was prepared, was submitted to Mrs. Sippel, she prepared the checks, and the checks were sent in to the two parties signatory to the checks. They signed it merely based on the list they had in front of them and returned the checks to Mrs. Sippel and she returned it to Miss Hunt, who disbursed them. From that, your Honor, I say the jury could infer that the two parties signatory, Shaffer and Brinker, had no knowledge of the purpose for which the checks was issued, and, therefore, their inability to testify is not prejudicial in any way to the case against the defendant.

THE COURT: Do you wish to produce any evidence?

MR. MILIDES: Yes, I do, your Honor. I wish to call the defendant, Mr. Wilson.

THE COURT: You may do so.

GEORGE J. WILSON, JR., having been duly sworn, was examined and testified as follows:

[20] DIRECT EXAMINATION

MR. MILIDES: I would like to apologize to the Court for not standing when addressing the Court. I was just told by co-counsel.

BY MR. MILIDES:

Q Your name is Mr. Wilson?

A Yes, sir.

Q And back in 1966, Mr. Wilson, what was your occupation?

A Business manager for Local No. 367 IBEW.

Q And how long had you been, when did you first take the position of business manager for that union?

A In the year 1955, I believe. I am not certain, I think it was '55 or '56.

Q Now, did there come a time when the membership of the union decided to sponsor a program with respect to housing?

A Yes, sir.

Q What kind of a program was that?

A It was a program that was provided for under the National Housing Act, Section 221(D)(3) they referred to. It is to provide housing for the low to middle income groups within certain areas. The Act provided for financing to groups that were formed on a non-profit basis.

Q Did the union then undertake to sponsor such a housing program?

[21] A Yes.

Q And did it then form an organization?

A Yes.

Q And what was the name of that organization?

A Easton Arms, Inc.

Q Did it acquire land?

A Yes.

Q And where did it acquire land?

A In the City of Easton on Canal Street.

Q Now, would you outline to his Honor what experience the union had in getting this project off the ground, the difficulties it encountered and what it necessitated?

A Well, it wasn't easy because of the red tape involved in the local political level, as well as the national level. It seems that the Act was written, but it was tough to implement. First of all, we had to organize a non-profit group, which took roughly nine months to get through our local courts. As a matter of fact, it was referred to a Master's Hearing because it was complex, how a union was going to become a non-profit organization to provide this, and so forth. Then we had to make applications to the FHA for a preliminary survey, and we tied in activity with the Redevelopment Authority who had a piece of property that had been handed back to them, I believe, five times from the initial developer. The property in question, [22] the property that we eventually built on, is on Canal Street, and the first developer bought it for $25,000.00 and, after each year of non-building, it reverted, and when it got to us, because we promised to build and overcome all these hurdles, they gave it to us for $1.00, but this took a lot of doing,

a lot of political moves, I guess you would call them. There is no other word for it. We had to negotiate ourselves with the—

Q Now, did the Easton Arms hold meetings in restaurants?

A Oh, yes.

Q Did you have any experience with the FHA, and I am speaking now with respect to the Newark office?

A Oh, yes.

Q Were there meetings in that respect?

A Yes.

Q Will you tell us what was involved and where the meetings occurred?

A Well, the meetings with the Newark office of the FHA were held at various places throughout the state of New Jersey, but mostly in the Newark area. We were trying to get another 221(D)(3) program for Phillipsburg, New Jersey, where we also had acquired land.

Q Did people from Newark ever come to Easton, Pennsylvania?

[23] A Yes.

Q Did you have meetings there?

A Yes.

Q And where?

A Well, the most convenient place for a meeting in Easton would be the Circlon Restaurant where we, on numerous occasions, took the bottom room and invited the parties from the FHA or from wherever, political—

Q Was it necessary for Easton Arms to coordinate the efforts of redevelopment, city council, and FHA?

A Absolutely.

Q Was that the purpose of those meetings?

A Yes.

Q Will you tell us who was present to the best of your recollection at the first meeting at the Circlon?

A At the first meeting at the Circlon, as of the best of my knowledge, we had both mayors—

Q When you say both mayors—

A The one from Easton, Mayor Smith, and the one

from Phillipsburg, Mayor Forton. We had either the entire or a representative group from city council.

Q And that is how many in number, sir?

A Well, five members of city council from Easton and I think [24] the same from Phillipsburg, although I am not sure.

Q Was the solicitor for council there to the best of your recollection for both?

A Yes. We had Congressman Rooney from the Fifteenth Congressional District. He had attended some of our affairs. He was very active in giving us assistance in getting this thing off the ground.

Q Who was present from the Redevelopment Authority?

A At the time the executive director, Mr. Joseph Dowell, was always present, and whatever member of the authority was available to come to lunch and listen to what was planned.

Q Now, who would pay for that type of meeting?

A The local union.

Q Now, did you ever discuss this with Mr. Shaffer and Mr. Brinker after this meeting or before this meeting who should be present at that meeting?

A Certainly, yes.

Q Were there other meetings?

A Oh, yes, many meetings.

Q What meeting comes next to your mind chronologically?

A Well, meetings on Washington, D.C. were held quite often at various places that—

Q Was it necessary for you to meet with the director of the [25] —

A Of the FHA?

Q Of the FHA?

A Mr. Thomas Gallagher was present at one or more, several, I would say, meetings at the Circlon with Mr. Sullivan, with Mr.—

Q Did you ever meet with Mr. Prothro?

A Yes.

Q Who is he?

A He is general counsel for the Federal Housing Administration under Commissioner Bronsteen, who was commissioner of the FHA in Washington.

Q Now, did Easton Arms ever underwrite to pay the expenses to transport to Washington its mayor to meet with Mr. Prothro?

A Yes, and also the mayor of Phillipsburg, Mr. Joseph Brennan.

Q And who else was at that meeting, if you recall?

A Mr. Burke, William L. Burke, Esquire.

Q What was his capacity?

A He was at the time Democratic City Chairman, which was very important, but he was also a City councilman.

Q Who else attended that meeting?

A At that particular meeting in Washington I can't recall if there was anyone else, but out of the group that went down—

[26] Q Was Mr. Shaffer present?

A Oh, yes, I'm sorry, yes.

Q Now, did you discuss with Mr. Shaffer before going to this meeting who should go, what people would represent what interests at that meeting that should be present?

A Yes, we had a meeting of minds.

Q Who paid for the expenses of that meeting?

A Local 367.

Q And it was charged to which account?

A Easton Arms.

Q Now, were there other meetings such as this?

A Yes, we had a big thing out at Scandinavian Inn.

Q Who was present at that? Was it the same interests?

A The FHA personnel at the top, the—I forget who came up from Washington. It might have been Mr. Connell, I'm not sure. Congressman Rooney was supposed to have been there and he couldn't make it, but he sent notes in to be read at the meeting, and we invited just everyone, including the press.

Q OK. Now, this all pre-dated the marriage which

your daughter celebrated in June of 1966, is that correct?

A I would say so.

Q Now, did there come a time when you entered into a discussion with Mr. Shaffer and Mr. Brinker concerning the pending marriage [27] of your daughter?

A Yes, I guess I did.

Q Did you have occasion—well, strike that. Up to this point was Mr. Brinker and Mr. Shaffer active in getting the promotional aspects of Easton Arms off the ground?

A Sure.

Q Did they cooperate, would they work with you in making out lists?

A Of course.

Q People who were to attend?

A Some I didn't want, I didn't want personally, but they suggested, I am sure they had a good reason.

Q All right. Now, in June of 1966 did you have occasion to speak with Mr. Brinker and Mr. Shaffer concerning the list of people that were to attend your daughter's wedding?

A Yes.

Q Was consideration given to the movement or the activity of the union with respect to Easton Arms?

A Sure.

Q Now, were people invited to that function, by that function I mean the wedding, that you would ordinarily not have invited had Easton Arms not undertaken Kennedy Gardens?

A About eighty percent of them.

[28] Q Now, I want you to tell this Court the names of the people that were present at that wedding, to the best of your recollection, that were there because of Kennedy Gardens and Easton Arms?

A Well, every politician in the entire Easton-Phillipsburg area was invited.

Q Can you name them quickly?

A Mayor Brennan, Mayor Smith, again the Redevelopment Authority, the solicitors, many attorneys who had knowledge of the Housing Act one way or another, clergy, the news media, the Housing Authority.

Q With respect to the members of the Redevelopment Authority, were they present?

A Oh, yes.

Q Do you recall how many they were in number?

A I didn't count, but I assume they were all there because it was a good party.

Q Did you at any time direct Mrs. Sippel to pay that two thousand odd dollars?

A No, I had no knowledge of it. No, I did not direct Mrs. Sippel at any time to sign a check like that.

Q Did there come a time when you found out that the bill had been paid?

A Yes.

[29] Q And when was that?

A I would think between Thanksgiving and Christmas of the year following the wedding. I think 1966, sometime then.

Q Did you have a conversation with Mr. Brinker and Mr. Shaffer concerning it?

A Well, it was brought up and they said, "Don't worry about it, it's paid," and I did mention, and they said, "Well, it's part of promotion. It could have been just another political thing." So I didn't push it any further. I didn't do anything about it.

MR. MILIDES: You may inquire.

CROSS EXAMINATION

BY MR. MULLOY:

Q Mr. Wilson, let's go back. You talked about the meeting at the Circlon Restaurant?

A Yes.

Q And that was for the purpose of the promotion of the Kennedy Gardens Apartment project. Did you have speakers there?

A Not as such.

Q Did you have maps, diagrams?

A Oh, yes.

Q Plans of what it was you intended to—

A Oh, yes.

Q Did you show them at that time?

[30] A Well, I can't say right now how many meetings we had at the Circlon, but at various meetings at the Circlon we came with sketches and we had an architect at one time projecting what his ideas were, and the mayor would speak. It was a round table type of thing.

Q A round table type of thing?

A It was as formal as it could be under the circumstances.

Q But you produced plans and projects as to what you planned to do at Kennedy Gardens and so forth?

A Yes.

Q Was that pretty much true of all the meetings at the Circlon?

A And the Hotel Easton. I just happened to think of another one at the Hotel Easton where the mayor on record, Mayor Smith, stated that he was going to change the name of Canal Street to Wilson Boulevard, and I told him not to do me any favors, just clean up the neighborhood so we can build nice apartments.

Q And the same is true of the Scandinavian Inn?

A The Scandinavian was attended by many dignitaries. As a matter of fact, we even had a magician there to show how things could be done with legerdermain.

Q But you also showed how things could be done with plans?

A Oh, yes, we outlined, and Congressman Rooney would have been there. He was very enthusiastic about this, but he couldn't due to [31] a prior commitment, but he sent in a speech which was read by me, incidentally.

Q But you talked at these meetings about bricks and mortar and money for the project, didn't you?

A Yes.

Q And authorization to go forward with the project, am I right?

A We talked about the project, yes.

Q Was Mr. Burke at all these meetings?

A He was at most of them, I would say.

Q What was his function during this time?

A Mr. Burke was the attorney for Easton Arms.

Q And what was Miss Hunt's function?

A His secretary.

Q How did most of these meetings get paid for? Were you familiar with the mechanics of paying for them?

A Yes.

MR. MILIDES: If your Honor please, I am going to object to this. I believe it is beyond the scope of my direct.

MR. MULLOY: That's the last question. He answered the question, that's the end of that.

MR. MILIDES: I will withdraw it.

BY MR. MULLOY:

Q All right, now, at the wedding, did your daughter have anything [32] to say about the wedding guests for her own wedding?

A That's a good question. She had a few people there, but not many.

Q How many people were at the wedding, do you recall?

A Don't hold me to it, but I would say four hundred.

Q If I said the bill was 321 dinners, would that seem pretty accurate?

A A pretty good guess.

Q Did your prospective son-in-law have anything to say about the wedding?

A He invited his parents, of course, and the immediate family, but I assure you there was no significant number.

Q Do you have any idea how many you permitted the prospective son-in-law to invite?

MR. MILIDES: I object, if your Honor please.

THE COURT: I think that's a perfectly proper question.

MR. WILSON: Sure, twenty five, maybe thirty.

BY MR. MULLOY:

Q And how many did your daughter invite?

A I think we got into a little standoff there, a Mexican standoff. We both invited the same. If they agreed to cut out children under twelve, we agreed to cut children under twelve.

[33] Q So between your daughter and prospective son-in-law you had twenty five people they wanted to invite?

A I don't know precisely how many they had. I just used that number to show they tried to keep it as equal as they could. If I may, at this time state that there was an engagement party held at Long Branch, New Jersey where my son-in-law is from, his parents, a very fashionable restaurant, and the entire entourage, as such, from our both sides, numbered perhaps fifty people, and that was the real representative group that attended the big thing at Hotel Easton. That was the cocktail party and full dinner and entertainment from all interested parties from both sides, and that number was about fifty, I think.

Q Did you have the plans of the Kennedy Gardens project at the wedding reception?

A No.

Q Did you discuss money, bricks, mortar?

A Yes, I would say this was discussed. People are put in certain positions where they had discussions.

Q This was a promotional gimmick, you say, your daughter's wedding was a promotional gimmick for Kennedy Gardens?

A This was a promotional attempt to put people together that could see what this project would do for the area.

Q Did you—never mind, it's going to facetious.

[34] A That's all right, we succeeded.

Q How far along was the project at the time, that is, at the time of the wedding?

A That I honestly, I can't remember what stage it was in.

THE COURT: When was it built?

MR. WILSON: In the 1966, '67.

THE COURT: '67?

MR. WILSON: '66 and '67, your Honor, honestly—

THE COURT: Well, the wedding happened in June of '66, did it not?

MR. WILSON: Yes.

THE COURT: And it was sometime after that the project got underway, is that right?

MR. WILSON: As I recall, but the project, the building of it, as such. wasn't the big thing. It was cutting through the red tape and getting financing.

BY MR. MULLOY:

Q Am I wrong when I say that in June of 1966 the building was already underway?
A I don't know.
Q Do you recall when occupancy, first occupancy was?
A I cannot answer that. I left the union shortly thereafter and I don't know.
[35] Q You were no longer business manager after about what, November of 1966?
A I would say yes.
Q And at about the same time Kennedy Gardens was opened for occupancy, wasn't it?
A Somewhere in there. I tell you I don't know.
Q And how many units were there?
A Seventy-five.
Q You don't recall now when construction started?
A Not really.
THE COURT: That would be a matter of record, Mr. Mulloy.
MR. MULLOY: It is a matter of record, your Honor.

BY MR. MULLOY:

Q Do you recall the total cost of this reception?
A A couple thousand dollars.
Q If I said $2,466.30, does that sound about right?
A Yes.
THE COURT: Can't you show him the bill?
MR. MULLOY: Yes, I will, your Honor.

BY MR. MULLOY:

Q I'm sorry, I think it is $2,233.15. I am showing you a copy of the ledger account. Perhaps we should have it marked for identification.

[36] (G-2, G-2A, G-2B, being ledger accounts, marked for identification.)

(Exhibits shown to Court and defense counsel.)

BY MR. MULLOY:

Q Now, I am going to show you a document marked for identification G-2, which is an Easton Motor Hotel ledger in your name, Mr. George Wilson, 4615 Charles Street, Easton, Pennsylvania. That is you, is it not?
A Yes.
Q Would this be the amount, this $2,213.15? Would that be the amount of the reception, the cost of the reception?
A Yes.
Q Would you take a look at G-2A and B and tell me whether they are the supporting documents for that ledger?
A I don't know about the figures, but they apparently are.
Q They show various items that were presumably served at the reception, don't they?
A Yes.
Q The total amount then is $2,231.00, is that it?
A Yes, $2,233.15.
Q Now, the indictment charges you with applying to that wedding reception the figure of $1,233.15. Can you tell me, and you say the union paid for this? Are you telling me now that [37] the union paid for the entire amount of the reception?
A No, I am not telling you that.
Q Because the Government's proof will be that of the check, which is mentioned in the indictment, only $1,234.00 was applied to the cost of the wedding reception. $1,000.00 had already been paid. Who paid the previous $1,000.00?
MR. MILIDES: Objection.
THE COURT: I will sustain the objection. I don't think that is within his knowledge unless he did it. I know that is what you were asking him, but you weren't asking him in that question properly.

BY MR. MULLOY:

Q Mr. Wilson, did you pay any part for that wedding reception?

A Not according to this ledger.

Q Do you have any independent recollection of whether or not you paid?

A No, I can't recall.

Q You cannot recall whether you paid any part of it?

A No, I can't. I think—I can't recall.

Q Do you recall what the agreement was with regard to who would pay for the wedding reception?

MR. MILIDES: This is objected to. It presupposes something that is not in evidence. If there was an agreement— [38] it is an assertion of counsel, if your Honor please.

MR. MULLOY: I understand from his testimony he said he discussed the wedding with Mr. Brinker and Mr. Shaffer and evidently, they decided on the list, and—

MR. WILSON: It was never discussed. Payment was never discussed. It was discussed as to who we should invite and would it—I mean payment was never discussed.

BY MR. MULLOY:

Q Then you never understood the union would pay for the wedding reception?

A No.

Q You understood you would pay for it out of your own pocket?

A Yes.

Q But you don't recall whether you did pay for any of it?

A No.

Q Do you recall when you first acquired the land upon which Kennedy Gardens was eventually built?

A No.

Q It was sometime considerably prior to the wedding, was it not?

A I don't know, your Honor. I say I don't know. May I qualify that?

THE COURT: Certainly.

[39] MR. WILSON: I had a, during that period I had a rather severe drinking problem, and the only way I can jump right back into that, I just don't recall the exact date, I'm sorry, I don't. I was hospitalized for it and haven't had a drink in five years.

THE COURT: That's good.

BY MR. MULLOY:

Q At the time you arranged for the reception did you intend to pay for it yourself?

A Yes, I would say I did.

Q But you never did pay for it?

A No, I don't recall whether I did. I don't recall whether I paid anything.

MR. MULLOY: No further questions.

MR. MILIDES: No further questions.

THE COURT: You said that you left the union?

MR. WILSON: Yes, your Honor.

THE COURT: What are you doing now?

MR. WILSON: I am in a business that I franchise. It is a method for stripping paint off furniture. It is a chemical. You dip it in a tank and take the paint off for refinishing.

THE COURT: Is this all you can tell us about the actual arrangement of which resulted in Mr. Shaffer and Mr. Brinker paying, signing these checks for the payment of $2,024.09?

[40] MR. WILSON: With respect to—

THE COURT: We are not going to be able to have Mr. Brinker and Mr. Shaffer here. Mr. Brinker because of his death, Mr. Shaffer because of his illness.

MR. WILSON: There is no one more sorry than I about that.

THE COURT: This I realize, but the question I am asking you is is there anything you want to tell me about the way in which Mr. Shaffer and Mr. Brinker approved of this check?

MR. WILSON: I think—may I diverse?

THE COURT: You may diverse. You can answer my question to suit yourself.

MR. WILSON: I feel when you are in a position, such as I was in, the elected official, I had no right to sign any checks, make any disbursements, I had no right to attend an ordinary meeting, I never signed a check, I

never made any disbursement, and any bill I incurred went before the local meeting. It was presented to the local meeting, it was voted on, the voucher was issued, these two officers signed it. If anything was done different than that, charges would be presented against me and I would be in a jam with the International. That never happened. I assumed since I had the power to appoint, now I appointed Mr. Shaffer to his job and I appointed Mr. Brinker to his job as my assistant, but not as president and not [41] treasurer—they were elected—but since they were elected, it was obvious they were popular with the membership. So the work involved could be done a lot easier and functionally with two assistants, and I put them on, which was within my rights, and the local membership did not object to this. Well, I assume they just took it upon themselves to pay this check, the same—I wasn't at a meeting when they gave me a brand new Cadillac. I gave it back to them. I didn't take it, but that is a matter of record, but this was paid and, well, it was paid, and I am not going to get mad if somebody pays my bills. I didn't do anything wrong. The hotel didn't dun me for the bill, as such. All I know is it got paid and I assume they just took it upon themselves to pay it. You see, the Easton Arms project was supposed to eventually make money, and it would be held by the union until the mortgage was paid off, and then it could theoretically be sold at a profit and go into the pension fund, but as a result of local politics and national politics things got a little sticky because we couldn't rent. To rent to low or middle income persons, we were restricted. We couldn't rent to our own people, we couldn't rent to people who really needed housing because they made just that much too much more money and, if they signed a paper that they didn't make that much, then they were open and we were open, so the thing wasn't as perfect as the administration drafted it to be, [42] and we got caught up. I quit and I resigned and that is the end of it.

THE COURT: And this bill or a great portion of the bill was incurred by reason of the promotion for the Easton Arms?

MR. WILSON: There is no question about that in my mind because I would never have invited the people I invited to my daughter's wedding, I assure you, because, all right, personally I didn't like some of them, but that was over and beyond, but I had to cater to these people to create the right public opinion to rent, for instance. If the place had been built, this was still public relations because we were trying to rent these. We were trying to smooth the waters. The FHA says, "You can't rent to him, he makes ten dollars too much a week." There's a guy who really needs a house. We have to take somebody on public welfare and put him in. This was not public housing. This was private housing, but it was built on a non-profit basis and the realtors in town got upset about it because we were knocking them out of their sixty dollars a month. The bankers were upset because—I went to the banks to try to get the money on a Government commitment. They said no. They wanted thirty thousand dollars in cash in case we went out on strike while we were building it. So we had to go to Bryn Mawr Trust in Philadelphia to get the money. Everything was against us, everything, except the people that needed the housing.

[43] THE COURT: Any questions, gentlemen?

MR. MULLOY: I have one further question, maybe two questions.

BY MR. MULLOY:

Q Do you know a gentleman named Marvin Dalrymple?

A Yes, sir.

Q What was his position from June to November of 1966, if you recall?

A As far as I can remember, he had something to do with the Hotel Easton. I wouldn't know.

Q Did you ever discuss the questioned bill with him?

A Not to my knowledge.

MR. MULLOY: I have no further questions.

MR. MILIDES: No questions, your Honor, and the defense rests. Does your Honor have any questions?

THE COURT: I think I have explored it.

MR. WILSON: Thank you, your Honor.

(Witness leaves stand.)

MR. MILIDES: If your Honor please, I would like to renew the motion.

THE COURT: I will take it under consideration and advise you at two thirty. I have a meeting to attend and I have to—I will make my decision when I come back.

MR. MULLOY: Your Honor, before you adjourn, if I may, [44] may I submit to your law clerk while you are at the meeting some case authority?

THE COURT: I would appreciate it. We have Marion, which, of course, I think, is the essential most important case, and I would like to read that carefully in relation to this case.

MR. MULLOY: Yes, I previously submitted Marion and Melnick. The authority I was thinking of is, I believe I can find some law on the subject, in the event that this point is troubling you, that the payment of personal expenses with union funds, even though authorized by union officers, still constitutes embezzlement under the statute.

THE COURT: I would like to see that case.

MR. MULLOY: Thank you, your Honor.

NOW, 12:35 P.M., Court recesses.

NOW, 2:32 P.M., Court resumes.

THE COURT: I have given a good deal of thought to a reconsideration of my order of March 13th, and I do not feel that I will reconsider it at this time. So that under that order the defendant's motion to dismiss the indictment is denied. I feel that the case of United States versus Dubritzy, decided in the Second Circuit by Judges Waterman, Friendly and Smith, covers the situation, and, therefore, we will proceed to trial.

MR. MILIDES: If your Honor please, I would move that [45] the defendant would ask that a jury trial be waived. I understand that the Government has to assent under the rules.

THE COURT: That's right.

MR. MILIDES: And ask Mr. Mulloy if he has any objection to proceeding without a jury. I would ask that the Court would incorporate by reference the testimony it has heard. Perhaps it would save some time and he could add whatever testimony there is and he could enlarge on what the Court has already heard.

Mr. Mulloy has asked me to stipulate to various things, namely, whether the union was involved in interstate commerce "a labor organization as such" and whether a marriage was celebrated. I was not inclined to so stipulate if it would be a jury trial. I will be willing to so stipulate if it will be a non-jury trial. I am giving that information, perhaps, so that Mr. Mulloy can weigh it in deciding whether he would grant a waiver or not.

THE COURT: Mr. Mulloy?

MR. MULLOY: The Government would object to the waiver of a jury trial. I do it primarily in fairness to the Court because I think there are going to be some difficult issues for the jury to resolve, particularly, the intent issue with regard to allocation of this check.

I would hope, however, that the matters I requested [46] stipulated could be stipulated. One is merely the matter of bringing down the Clerk of the Orphans Court and having him say this is a copy of a marriage license.

The other is more difficult for me to prove, that this is a labor organization affecting commerce. It can be done through calling the union president, testifying to what contracts the union has or had then, and then showing that these are contracts that are involved in commerce, and I might say that I understand there was a finding by the National Labor Relations Board back in 1961 that local 367 was a union affecting commerce. I do have that citation somewhere here. So that I would think considerable time could be saved if that portion of the testimony could be stipulated to.

THE COURT: You still feel it would be impossible for you to stipulate to those things? It seems to me they are so definite that it would hardly add anything to this trial to have them proven.

MR. MILIDES: Except that Mr. Mulloy is asking me to stipulate, if your Honor please, to an element of

the offense and, if, per chance sometime in the future, this record has to be reviewed, I don't want my competency questioned, and I say that in all earnestness and in all seriousness. I don't feel that the duty I owe and the allegiance I owe this defendant allows me to stipulate.

[47] THE COURT: Well, on that basis the Court will not take the case on a waiver, and you will just have to prove your case, Mr. Mulloy.

MR. MULLOY: Right, sir.

THE COURT: Now, in view of the fact we have now reached the point of picking a jury, I believe that they are ready to pick up a panel, and I would not think that my presence would be required, but, if that is true, then I would want a waiver of my presence. Do you want the court reporter down while you are just picking the panel?

MR. MULLOY: I think not, your Honor.

MR. MILIDES: No, your Honor.

THE COURT: Good.

DEPUTY CLERK: I have waivers for both situations, your Honor.

THE COURT: All right. We will have the waivers signed, then proceed to pick your panel, and then bring them up here and pick your jury. I will be in my chambers if you need me.

NOW, 2:40 P.M., Court recesses.

Reported by:

Elizabeth P. Mensch

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 71-587

UNITED STATES OF AMERICA

vs.

GEORGE J. WILSON, JR.

Before HON. JOHN MORGAN DAVIS, JR., and a jury.
(Two alternates.)

Philadelphia, Pa., March 15, 1972

FIRST DAY

Elizabeth P. Mensch
Official Court Reporter
3051 United States Courthouse
Philadelphia, Pa., 19107
WA 5-9480

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[2] MR. LAUER: Yes, sir.

THE COURT: Would you get your voice up so that I can hear you?

MR. LAUER: My apologies. We would like to move for the removal of the other Government witnesses, and for that reason, I so move that the Government witnesses be sequestered, secluded [3] from the courtroom.

MR. MULLOY: Your Honor, I have no objection to sequestration of the witnesses, with one exception. If I may have the investigating agent, Mr. Hargis, here through the trial.

MR. LAUER: We have no objection to that, your Honor.

THE COURT: All right. Will you notify your witnesses to leave?

MR. MULLOY: Would you people please wait outside and we will have to call you when your presence will be required.

(Witnesses leave courtroom.)

• • • •

[10] WILLIAM G. NORDLING, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MULLOY:

Q Your name is William G. Nordling?

A Yes.

Q Where do you live, Mr. Nordling?

A 20 Lawrence Road, Madison, New Jersey.

[11] Q Mr. Nordling, what is your occupation?

A I am president of Nordling Dean Electrical Company.

Q What does Nordling Dean—

A Nordling Dean Electric Company, Incorporated.

Q What type of company is that?

A We are involved in construction and installation of electrical equipment, lighting, fixtures, signal systems, building power plants and other type structures.

Q Where does your company perform this work?

A Primarily in New Jersey, and we have an office at 2600 William Penn Highway in Easton, Pennsylvania.

Q How long has your company been in existence?

A Forty-five years.

Q And how long have you been working in the Easton and New Jersey area?

A We have worked in New Jersey forty-five years. We have worked in Easton area since 1964, within the jurisdiction of local 367, and we have worked as far west as California.

Q Now, you say within the jurisdiction of local 367. I am going to ask you to describe a little bit more what it is your company does. You are what we call a sub-contractor, are you not?

A Essentially we are.

Q If somebody, a general contractor, contracts for the building [12] of a power plant, he has certain types of work performed by what we call sub-contractors, am I right.

A That's correct.

Q And this is the type of work you do?

A Precisely.

Q And it is electrical work you do?

A Electrical only.

Q Now, in the Easton area and in the New Jersey area who performs this work for you? Where do you get your work force?

A We get our work force from the local union that has the jurisdictional control of a particular area. For instance, we are signatory to Morristown local 581 IBEW.

Q Is that Morristown, New Jersey?

A Its headquarters are Morristown, New Jersey, and it comprises Morris County and a small part of Union County and Sussex County.

Q You said IBEW?

A That is the International Brotherhood of Electrical Workers. That is the international organization located in Washington, D.C.

Q I see. Now, you say that you are party signatory to the contract of the Morristown local?

A That's correct.

Q Suppose you were to perform work in the Easton area?

A When, by virtue of the fact we have associated through [13] Morristown local and the International Brotherhood of Electrical Workers, we are privileged then

to work and employ men through any IBEW local, such as 367, or one in California. That is our privilege so long as we are signed up appropriately signed up with 581 and the International Brotherhood of Electrical Workers.

Q Do you use men from local 367?

A Yes, we do.

Q Have you used them in the past?

A We have used them in the past.

Q Did you use them in the period, let's say, June to November, 1966?

A We have continuously since 1964 primarily, through, yes, 1964, 1965 to date.

Q Perhaps, I think it would be helpful to the Court and to the jury if you would describe if you have a contract in Easton, let us say, how it is you obtain these men?

A We apply to the business agent of the local 367. They are aware, of course, they know what's going in, so we tell them we have a job, for instance, in Belvedere, New Jersey. I might say this, local union 367 has jurisdiction in Easton and proceeds north in Pennsylvania to, I don't know where it stops, I am aware of Stroudsburg, and spills over into Warren County and part of Huntingdon County in New Jersey. That is the area which they control and which they man the various jobs that require union [14] labor.

Q I see. You say you applied to the business agent?

A We apply to the business agent for, first, a foreman. We look to them for a man who will act as foreman on that particular job representing 367 and also representing us, but he is on our payroll, but he is a union employee, a union member, and we have our own supervisor to visit that job that does not work with the tools. Then, as the job mans up, we get men from the local union having jurisdiction, and they man the job through its entire completion program.

Q Now, why don't you just go hire electricians?

A No, because, you see, we are signed, through the medium of our signatory to 581, we agree we will employ

only union electricians through the jurisdiction of the IBEW.

Q I see. And are you telling us that local 367 represents then, as a union, the men that you employ in the Easton area?

A 367 represents the men that we employ within their jurisdiction.

Q What do they do for the men aside from you have to go to them to hire the men?

A Well, they set up, they bargain for wages, working conditions, and the agreement that is signed by both the contractors representatives and also the union representatives, these are the hourly rates of pay, the hours of work, the overtime conditions that would prevail, the wages that would prevail on overtime [15] hours, anything beyond the normal forty hour week. These are, and certain working conditions, appointment of shop stewards, and so forth. In other words, they man the field to do all the physical work required as far as electrical installation is concerned. We supervise it and we pay the men through the normal bargained rates of pay.

Q The rate that is bargained by the union?

A Bargained by the union, jointly by the union and the representatives of the contractors in the local 367 area.

Q I see. Now, suppose there is a grievance occurring on a job?

A Well, if there is a grievance that is jurisdictional in nature, in other words, it could be—

Q Let's forget the jurisdictional. Suppose it's a grievance similar to a man saying I should be paid overtime for certain work?

A Well, if it's a grievance that can be resolved by a joint meeting with the local, the executive committee of the local union, it can be resolved locally. If it goes beyond the point where it cannot be resolved, then it is taken to the Council of Industrial Relations in Washington. This happens primarily at the time of bargaining between the local union and the Contractor's Association.

Q In the Easton area and Phillipsburg area who rep-

resents these [16] electrical workers in the presentation of grievances to the contractor?

A The executive committee or the business agent.

Q Of whom?

A Of local 367.

Q And how long has local 367 to your knowledge been engaged in this type of representation?

A To my knowledge I would say at least thirty years to my knowledge. We have worked in Pennsylvania in the Bethlehem area, which is in a different local union, but I know it was an Easton local even in those days, and I would say at least thirty years.

Q I am going to direct your attention to the period of June, 1966 to November, 1966 and ask you if you did any work with that union at that time, with local 367?

A Yes, we were working with them.

Q Do you know who the business manager of the union was at that time?

A George Wilson.

Q George Wilson. Is he here today?

A He is here.

Q Where is he?

A The gentleman with the glasses and the sort of pink shirt.

[17] Q You are indicating the man sitting at counsel table?

A At that table with one of the three men there.

Q In the performance of your work, let's assume—did you build a building in Easton, say, in 1966?

A Yes, we did.

Q You performed the electrical construction work?

A Yes.

Q Where would the materials you used in the work have come from?

A Well, the principal pipe and wire would probably be ordered through a supply house in Allentown in the Allentown area, the Bethlehem area. Special materials, such as switch gear, lighting fixtures, would be ordered through a supply house, but would come from anywhere in the United States.

Q Can you give me an example of one supplier somewhere in the United States?

A Well, if it is switch gear, it is General Electric Company. They make the transformers in Rome, Georgia, the panel boards in Plainville, Connecticut. So they are manufactured in those various locations that General Electric Company operates, and then brought to the job and assembled in the field by local 367 men.

Q And you use all this type of material in the work that you perform?

[18] A Yes, indeed.

Q Do you also do work in the Phillipsburg area?

A Yes, we have.

Q Using local 367 men?

A Yes, we do.

Q Did you in the period of time we are talking about, 1966?

A Yes, we had. We first started in 1964. We had an office in Washington, New Jersey, and then about 1966 we came into Easton, Pennsylvania, but when we were in Washington, New Jersey we employed men from local union 367.

Q Where did the materials come from that you used in your New Jersey project?

A Presently they are coming from Pennsylvania, that is routine material such as pipe, wire box, and so forth, the items built into the structure. The speciality items come from anywhere in the United States.

Q All right. Now, with regard to these jobs if there had been a work stoppage on any of these jobs, what would have been the effect of the shipment of materials?

A We would automatically authorize, ask the supplier to hold shipment to the job until the dispute was settled. In other words, we wouldn't, we couldn't receive it on the job if there was work stoppage. We would have no one on the job to receive it, so, therefore, we would have to ask them to hold off delivery [19] or just postpone delivery until the dispute was settled.

Q Would this include the out of state supplier?

A Definitely, anyone.

THE COURT: Would you keep your voice up a little more? The jury must hear you, you know.

MR. NORDLING: I shall.

MR. MULLOY: You may cross examine.

CROSS EXAMINATION

BY MR. MILIDES:

Q Mr. Nordling, as I understand it, before 1964, sir, your base of operation in New Jersey was not in Washington, is that correct? It was in some other city?

A Summit, New Jersey.

Q And in 1964 you branched out and came to Washington, New Jersey.

A That's correct.

Q Which is how far from Easton, Pennsylvania?

A Oh, I would guess about fourteen miles.

Q And then in 1966, some two years later, you moved your operations from Washington, New Jersey to Easton, Pennsylvania?

A Yes, to the present location.

Q In '64, whenever you needed men for your electrical work, you went to the IBEW 367?

A That's correct.

[20] Q That's when you were back in Washington, New Jersey?

A That's correct.

Q And you knew of its existence even prior to that because you had done some work in Bethlehem, but through some other local?

A That's correct.

Q Now, your organization, sir, is a rather large and substantial one, isn't that correct?

A I don't want to appear immodest. I will say yes.

Q And you did substantial work in the area?

A We have.

Q Will you tell us, in 1964 what ventures you undertook, what in this particular area?

A In 1964 we did the pump storage job at Yards Creek for the Jersey Central Power and Light Company.

Q What was the contract?

A Our contract was over one million dollars.

Q Where did you get the men for that job?

A The foreman came from local 367 and all the men employed on that site by us for electrical installation—

Q Mr. Wilson was manager at that time?

A He was business agent at that time.

Q Now, what other ventures, what other work did you do after the Yards Creek job?

[21] A We worked as far west as Wilkes-Barre, up near Scranton, up in East Stroudsburg, we worked a bicycle plant in I believe, and Hellertown, and we did a lot of work for the last two and one half years for Hoffman Larcoche in Belevedere, New Jersey.

Q And in all of those jobs you had dealings with IBEW 367, is that correct?

A 367. Well, in Wilkes-Barre it was the Wilkes-Barre local. There was a different local, but IBEW men.

Q And Mr. Wilson was the business agent?

A He was business agent at that time, yes.

Q All right, O.K. Did you find Mr. Wilson honest in his dealings with you?

MR. MULLOY: I will object. The sole purpose of this testimony was to establish the nature of the labor organization with which Mr. Wilson was then connected.

THE COURT: I will overrule your objection. I will permit the question.

BY MR. MILIDES:

Q Did you find Mr. Wilson honest in his dealings with you? What was the relationship of Mr. Wilson and the union to which he belonged and your company?

A Well, the only relationship was that we would summon or call Mr. Wilson in time of need for men, the appointment or [22] selection of a foreman, he was very fair in giving us a good foreman to run our job, and I can say in all honesty he treated us very, very fairly.

Q Did you ever in the course of your business ever hear anything disparaging or discrediting to Mr. Wilson?

A No affairs with ours, never.

MR. MILIDES: That's all. Thank you very much.

MR. MULLOY: Thank you, Mr. Nordling.

(Witness leaves stand.)

(Witness enters courtroom.)

JEAN D. SIPPEL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MULLOY:

Q Mrs. Sippel, where do you live?
A 402 Old Mill Road in the city of Easton, Pennsylvania.
Q What is your occupation?
A I am office secretary for the International Brotherhood of Electrical Workers, local union 367 in Easton.
Q And how long have you been employed by local 367?
A Since mid October 1966.
Q And the time you began your employment with local 367 who hired you?
[23] A Mr. Wilson, the defendant.
Q And what was his position at that time?
A He was business manager and financial secretary.
Q Of local 367?
A Yes.
Q I take it you worked in an office?
A Yes.
Q And did Mr. Wilson work in that same office?
A Yes, although he wasn't present too much. He was out in the field a good deal of the time.
Q Was Mr. Wilson a salaried union employee?
A Yes, sir.
Q Were there any other salaried union employees, aside from yourself and Mr. Wilson?
A Yes, I believe at this time his assistant, Robert J. Shaffer, was on salary, and the treasurer was also in the office on salary, Mr. Brinker, Robert Brinker.
Q Who ran the office?
MR. MILIDES: If your Honor please, this is ob-

jected to. It calls for a conclusion. I believe she can testify what the operation was.
THE COURT: I think your question could be rephrased so that she would know what you meant.
[24] MR. MULLOY: All right, sir.

BY MR. MULLOY:

Q To whom did Mr. Brinker and Mr. Shaffer report in the operation of the office?
A I would assume Mr. Wilson, although I don't know for a fact.
Q I think you earlier said Mr. Shaffer was his assistant, did you not?
A Yes.
Q And that Mr. Brinker was treasurer?
A Yes, and Mr. Shaffer at that time was also president of the local.
Q Now, did the union have a—I am going to—the time we are talking about is at the time you were initially employed, November of 1966, through all these questions. What were your functions at that time as secretary?
A I was hired to come in and do the record work, the contact work with the contractors, and to generally train under Mr. Brinker in general office routine.
Q Did you handle the union bank account?
A Yes.
Q Would you tell us what you did with regard to that account?
A I opened mail, received checks for various funds from members, contractors, issued receipts, dues receipts, and made [25] deposits of the funds.
Q Did you issue checks on the account?
A Yes, I wrote them. I did not have power to sign them.
Q Was there anybody else there who typed or wrote the checks on the account?
A No, I generally wrote checks once a week for whatever bills there were for the week.
Q And you did not have power to sign them. Who had the power to sign the checks?

A The president and treasurer signatures are both required on all checks.

Q Is there anybody else's signature that could be put on those checks?

A Not to my knowledge in the local union's set up, no.

Q In other words, the only way a check could be valid was with the signature of the president and the treasurer?

A As far as I know, yes.

MR. MULLOY: Would you mark this G-1?

(G-1, being a check, was marked for identification.)

BY MR. MULLOY:

Q Now, Mrs. Sippel, I show you a check that is marked for the purposes of identification G-1. Would you describe that check please?

[26] A Yes, sir. It is check number 7390, issued on November 1st, 1966, in the amount of $2,024.09 for payment to the order of the Easton Motor Hotel, and marked re Easton Arms, Incorporated, and it is drawn on the International Brotherhood of Electrical Workers, local 367, general account in Easton National Bank and Trust Company.

THE COURT: How much?

MRS. SIPPEL: For two thousand twenty four dollars and nine cents.

THE COURT: Thank you.

BY MR. MULLOY:

Q Who signed that check, Mrs. Sippel?

A Robert J. Shaffer, who was then president, and Robert L. Brinker, who was treasurer.

Q Now, the check, you said, says re Easton Arms, Inc., on it?

A Yes.

Q Would you tell us what Easton Arms, Inc. was or is?

A Easton Arms, Inc. is a non-profit corporation formed for the purpose of funding and administering low to middle income housing which was later known as Kennedy Gardens Apartments in Easton.

THE COURT: May I see that please?

MRS. SIPPEL: Yes, sir.

[27] (Exhibit handed to Court.)

BY MR. MULLOY:

Q By whom was Easton Arms, Inc. formed?

A The local union sponsored the entire project, but the Easton Arms Corporation was formed as a completely separate entity. It had nothing to do with the local union itself.

Q Well, what is the significance of re Easton Arms, Inc. on that check?

A Well, at the time they had not been fully funded as yet, as I understand it, and they were advancing.

Q When you say they were advancing, who was advancing?

A The local union was advancing from their general fund certain expenses for the purpose of getting the operation established and operative. These funds were issued separately. They were kept a list separately on a running total which was inevitably suppose to have been repaid to the local union.

Q You say suppcsedly to have been. Was it ever repaid?

MR. MILIDES: Objection.

THE COURT: On what basis?

MR. MILIDES: If your Honor please, whether it is paid or not is not material to the issues and has no bearing on any fact in issue in this particular case.

MR. MULLOY: We are talking about union funds, your Honor, where the union funds went.

[28] THE COURT: I will permit the question. Your objection is overruled.

BY MR. MULLOY:

Q Would you read the question?

(Question read by court reporter.)

MRS. SIPPEL: Not to my knowledge, no.

BY MR. MULLOY:

Q How much is outstanding on that account?
A I can't give you the exact amount, but it is somewhat over thirty five thousand dollars.
Q Who are the officers of Easton Arms, if you know, at that time?
A This was formed before I came. I really can't tell you, although I believe the officers, the elected officers of the local union, were also serving as the board of directors and officers of Easton Arms, Inc.
Q Now, was Mr. Wilson on that board of directors?
A I believe he was at the time, yes.
Q Now, this check, I will repeat, has re Easton Arms, Inc., on it, were these checks prepared by you from different information than that which was prepared for other union payments?
A Yes. As I said before, we issued checks once a week and on the day that we issued checks, generally a Friday at that time, [29] the secretary of the Easton Arms would present us with a hand written list of checks that were tc be issued on this advance account for Easton Arms.
Q Who was the secretary?
A Gloria Hunt.
Q And you say she presented you with a handwritten list?
A Yes.
Q What did the list contain?
A Simply a list of checks to be issued, the names to whom they were to be issued and the amounts.
Q Was there any backup material for these amounts attached to the list?
A No.
Q And what did you do with the list?
A I issued checks, attached the checks to the list and put it in the folder for signature.
Q And what happened to the checks then?
A Both officers signed them and, after they were signed, the checks that were issued for this advance account were returned to Miss Hunt with her list, and what she did with them, I have no knowledge.

Q Mrs. Sippel, when the officers had the checks presented to them for signature, what information did they have—I am talking about Easton Arms checks now.
[30] MR. MILIDES: I am going to object, if your Honor please, unless the question is with respect to this particular check.
MR. MULLOY: Your Honor, I think it would be pretty difficult to ask Mrs. Sippel how she handled one check out of a series of checks. I think she handled them all the same fashion.
THE COURT: I will permit the question.

BY MR. MULLOY:

Q Were the officers provided with any more information—well, what—strike that. With regard to the Easton Arms checks what information did the officers have before them at the time you submitted the checks to them for their signature?
A The same list from which I prepared the checks.
Q Was there a voucher attached?
A There was a voucher issued to match the check, yes, they always were concurrently issued.
Q What information was on the voucher?
A Exactly the same as on the check.
Q You say you prepared these from a list submitted by Mrs. Hunt, Gloria Hunt?
A Yes.
Q Who instructed you to accept the list presented by her?
A I don't know that anyone definitely said to do it. It was [31] an established practice while I was there.
Q How do you know it was a practice, if you recall?
A Mr. Wilson had told me that Mr. Brinker was in charge of the office, would train me in the routine, and Mr. Brinker told me this is what they had been doing.
Q So that you just went ahead and did it?
A Yes.
Q There was no question with regard to your doing it?
A None in my mind.

Q Mrs. Sippel, you said that at the time you were hired Mr. Wilson was the business manager of the union?
A Yes.
Q Did he have any other title with the union?
A Yes, in this particular local the title of financial secretary and business manager are combined in the one office, which is permitted under the Constitution.
Q I had asked you to bring with you the by-laws and Constitution of local 367 as in effect at, in November of 1966. Do you have it with you today?
A I did not return to my home last night, no.
Q Initially, when you were told to bring these, you brought the current copies, did you not?
A They weren't specified as to years. I was told to bring the [32] Constitution and by-laws.
Q Could you please see that we get these documents as soon as you are relieved from the courtroom?
A Yes, sir.
MR. MULLOY: Do you have any objection to their being admitted at such time as they are presented?
MR. MILIDES: No objection.
MR. MULLOY: You may inquire.

CROSS EXAMINATION

BY MR. MILIDES:

Q As I understand it, Mrs. Sippel, the union was sponsoring some middle income housing, is that correct?
A That's right.
Q At the time, and in order to do that there had to be another corporation formed, is that correct?
A Yes, they were not allowed to use the union funds for this purpose.
Q Right, and they formed a corporation now known as Easton Arms?
A That's right.
Q And Easton Arms was in existence as a corporation, isn't that correct?
A It was at the time I was hired, yes.
[33] Q And during this period of time there were many meetings with respect to the promotion of this housing project?

A I understand there were, although I did not participate in any.
MR. MULLOY: I will object unless Mrs. Sippel knows of her own knowledge that there were meetings.
THE COURT: Mrs. Sippel, you can only tell us what you, yourself, know of your own knowledge.
MRS. SIPPEL: I did not participate in any personally.

BY MR. MILIDES:

Q But, did Mr. Brinker explain to you that when bills came in from the Easton Arms venture, the housing project, that a separate ledger sheet should be kept?
A He had already begun that and asked me to continue it.
Q Now, that was not Mr. Wilson, that was Mr. Brinker, is that correct?
A Mr. Brinker gave it to me, yes.
Q All right. Now, the union advanced Easton Arms how much?
A Right now they are carrying on their books a sum slightly in excess of thirty five thousand dollars.
Q Now, back in 1967 about a year after you were working there you had a visit from the FBI, Mr. Hargis, isn't that correct?
A Yes, sir.
Q And you showed him that ledger sheet, didn't you?
[34] A Yes.
Q And did he make notes?
A Yes, sir.
Q Did he make notes of all the vouchers and all the payments?
A Yes.
Q Of all the thirty seven odd some thousand dollars worth?
A He reviewed the entire account.
Q And did you explain to him that you were responsible to Mr. Brinker?
A I think he understood that, yes.
Q Did you tell him that Mr. Wilson in no way participated in the making of that check?

A He never asked me if he did.
Q Well, I am asking you now.
A The subject didn't come up and I did not make any comment about it, no.
Q I ask you now, Mrs. Sippel, did Mr. Wilson direct you to make out that check?
A Not specifically, no.
Q In other words, did he come to you and say make out a check to the Easton Arms in the sum of $2,024.09?
A No, he did not.
Q Did he engage in any conversation with you concerning this check?
[35] A Not particularly, no.
Q Really, to your knowledge, you don't know whether or not Mr. Wilson ever knew of the existence of that check?
A Not to my personal knowledge, no, I don't. I don't know.
Q Now, you say that the request to make the check was accompanied with a voucher, isn't that correct?
A Yes.
Q Well, and weren't these bills approved by the membership at the meeting?
A The only bills which require approval are any out of the ordinary expenses, and this had been an established practice. I don't know. I was not at any of the meetings. I am not allowed to attend. It is a membership, closed meeting.
Q So you don't know whether or not this bill was approved or not?
A I have no knowledge of what goes on at the meetings?
Q Now, who was representing the Easton Arms at the time, who was the attorney for the Easton Arms?
A William J. Burke of Washington, D.C.
Q To your knowledge were there any other checks made to the Hotel Easton?
A There may have been. I don't remember specifically.
Q Do you know if they were made to any other restaurants?

[36] A I know to the Circlon Restaurant in Easton there was at least one, perhaps more. I don't recall.
Q Do you know what that was for?
A Not of my personal knowledge. I do not participate.
Q Well, were you aware, or did it come to your knowledge, that Easton Arms was in the process of promoting itself in this housing project?
A Yes, I realized that.
Q Now, this money that Easton Arms used out of the Easton National Bank and Trust Company account of the union's were advances, is that correct?
A That's correct.
Q To be repaid, is that correct?
A Yes, sir.
Q Then what happened with the project? Was there difficulty after it had been completed?
A We had severe rental difficulties because of restrictions on income and type of occupancy. It was very difficult to attain a full occupancy, and I don't think from the day of its inception it ever operated at a profit. It was a total loss on the books constantly, and it eventually went into receivership.
Q What difficulty did you have with respect to restrictions?
[37] A We are very limited as to number of persons occuping the apartments. We were very limited on income restrictions and in the income level that we rented to and had to keep within, we very often hit people with great quantities of children, which threw over the occupancy amount. This was our biggest problem.
Q Well, how many units were there in this complex?
A I believe seventy five.
Q And when you say there was restriction as to occupancy, who imposed the restrictions?
A They were included in the set up with the Government.
Q You mean the FHA, the Federal Government?
A Yes.
Q Did you, perhaps to simplify it, so that I may better understand, would you explain what kind of restrictions, give us a for instance?

A Well, the apartments consisted of two bedroom and three bedroom units. We were limited to having no more than two children occupy any one room. The bedroom where the adults slept was not to be occupied by any child over the age of, I believe six months, and, as I said, families in this income level very often have six or seven children. We were dealing with fringes of all sorts in a very bad area of the town, and we [38] had great difficulty with the tennants moving relatives in over night, and we never knew how many people were going to turn up living in the apartment. We had a constant turnover of evictions for non payment of rent, for breaking rules, for damages, or for bringing relatives in, or stealing, all sorts of things. We had a lot of problems.

Q Did you work in your capacity after the project went into receivership?

A No, just the receiver kept me on for a period of one month afterward in order to help tie up all the record work, that's all. I wasn't with Easton Arms in any capacity until, I believe, sometime in 1967 when Miss Hunt and Mr. Burke severed their connection with the corporation. That was my first time with it. I wasn't hired in any capacity with Easton Arms, just the local.

Q Do you know when Mr. Wilson left, resigned the union?

A In November, around the fifteenth, I believe of 1966.

Q November of 1966?

A Yes.

Q And when did Mr. Burke leave Easton Arms?

A I believe they were there another year, May or June. It seems to me I was asked to assume the work of the corporation about a year later. I'm not positive of the date. I could supply it if I had to.

[39] Q Did you have any conversations with Gloria Hunt concerning this check?

A Only that she gave me the list from which it was to be prepared.

Q The instructions as to making out the check and to what to do with the list after the checks were made that came from Mr. Brinker, did it not, and that was the policy he had set up?

A This was what was the practice at that time, yes.

MR. MILIDES: No questions.

REDIRECT EXAMINATION

BY MR. MULLOY:

Q You say the instructions came from Mr. Brinker. Who told you to follow the instructions of Mr. Brinker?

A When Mr. Wilson hired me he told me Mr. Brinker was in charge of the office and would train me and, in the event anything were to happen to Mr. Brinker, or if he was to return to the field as an electrician, that I was to be trained at that point to take over the operation of the office.

Q In connection with his work in the office, he worked under another title, didn't he, other than president?

A Mr. Brinker?

Q Yes?

[40] A Mr. Shaffer was president. Mr. Brinker was treasurer.

Q Did he have another title?

A I don't know whether it was official or not, but he was office manager at the time.

Q Now, you have spoken with a great deal of authority about the Kennedy Gardens apartments and its problems, and I think you have explained it. Let's make it clear to the jury, at the time that we are involved with this check, November of 1966, what was your relationship with Kennedy Gardens or Easton Arms?

A Absolutely none.

Q When did your relationship, when did you start doing any work for Easton Arms?

A As I said, when Mr. Burke and Miss Hunt severed their connections, and I believe it was in 1967, in May sometime.

Q Did anyone else sever connection with Easton Arms at that time to your knowledge?

A Mr. Wilson.

Q Mr. Wilson severed his connection with Easton Arms then?

A Yes.

THE COURT: You were not given any authority to question the list of checks which Miss Hunt would submit to you?

MRS. SIPPEL: No, I had no reason to question it.

[41] BY MR. MULLOY:

Q Do you know, Mrs. Sippel, when the Kennedy Gardens project was completed, ready for occupancy?

A Not for a fact. I believe about the time I came with the local union they had just gotten their first tenants and first one or two occupants.

Q That would be in November or October of 1966?

A I believe, although I may not be correct, I am not positive.

Q It was certainly ready at the time you took over the operation or you became the manager of the Easton?

A Oh, yes. It was, I would say, about seventy percent occupied at the time.

Q And it had been occupied for some time at that time?

A Fluctuating.

Q It was available for occupancy at that time for some time?

A Yes.

THE COURT: Mrs. Sippel, after you prepared the checks, you placed them in a folder for signature?

MRS. SIPPEL: Yes.

THE COURT: Were you ever in a position to see them signed?

MRS. SIPPEL: Sometimes. Other times they were left [42] there and then, well, men would have meetings at night and they would be signed at that time, or when I was out to lunch. This specific check, I don't recall whether I saw it signed or not.

THE COURT: Did the officers ask you for any information as to any checks that they signed?

MRS. SIPPEL: Any check that I issued for the account of the local union, I always attached the bill I am paying to the check, and it is included in the folder for them to see, but, in the case of Easton Arms checks, the

only substantiating thing was the list that Miss Hunt had prepared.

THE COURT: And that was attached to the checks that you wrote and so did they recognize the preparation of this document by Miss Hunt?

MRS. SIPPEL: Apparently they did. They signed the checks. I have no knowledge.

THE COURT: You had no—there was never a time when the officers sent a check back to you without signing?

MRS. SIPPEL: No.

BY MR. MULLOY:

Q Do you have G-1 in front of you?

A Yes.

Q I picked it up and handed it to you just earlier this morning?

A Yes.

[43] Q When was the last time you saw that check?

A Yesterday morning on the stand at the preliminary hearing.

Q Where did you get it.

A I brought it with me from the office in Easton.

Q From the local IBEW?

A IBEW office.

Q And where did you find it in the office?

A In our bank statements.

Q How did you come into possession of the check after it was once signed, do you recall?

A After it was signed?

Q Yes?

A It was returned to me for dispersal, and I attached all these checks to the list and returned them to Miss Hunt.

Q But how did the checks get back in your hands?

A Through the bank statement.

Q So that it had been negotiated through the bank?

A Yes, sir.

MR. MULLOY: No further questions.

RECROSS EXAMINATION

BY MR. MILIDES:

Q Do I understand with every check that is issued there is a [44] voucher?

A Yes, there must be.

Q And would you explain to the jury what is meant by a voucher?

A A voucher is actually substantiation by the officers, and in this case the president and the recording secretary must both sign vouchers, authorizing or verifying that they have approved the expenditure.

Q All right. Now, you say that the voucher back in, and I am referring now to back in 1966, and I am talking specifically with respect to the check in your hand, there then was an accompanying voucher, is that correct?

A Yes, sir.

Q And who signed that voucher?

A The president and—

Q And that was who?

A At that time it was Robert Shaffer, and the recording secretary.

Q And at that time that was who?

A Who, I believe, at that time was C. Fred Thompson.

Q That is not the other co-maker on that check?

A No, it is not.

MR. MILIDES: That's all.

[45] REDIRECT EXAMINATION

BY MR. MULLOY:

Q Where is the voucher today?

A Probably in the records which we have packed away. We have just moved the office and I very carefully packed all old records and stored them. I could probably get it, but it will take a little time.

Q Did I ask you to bring it with you?

A Yes you did, but I was not served with a subpoena in time to go through all those back records.

THE COURT: Mrs. Sippel, did the voucher have more information on it then the check?

MRS. SIPPEL: No, it is identical to the check.

THE COURT: I see no reason to produce the voucher.

MR. MULLOY: Your Honor, I just wanted to clarify that I had asked her for it.

MRS. SIPPEL: Mr. Hargis did review it at the time he reviewed all the other records.

THE COURT: I would see no reason to have the lady go back home and look up that particular voucher because it is simply a repetition of the check.

MRS. SIPPEL: With the exception of the two signatures on it.

THE COURT: Yes.

MR. MULLOY: I have no further questions.

[46] THE COURT: Any additional cross?

MR. MILIDES: No, sir.

THE COURT: Thank you very much, Mrs. Sippel.

(Witness leaves stand.)

THE COURT: Your next witness.

MR. MULLOY: Your Honor, while the next witness is being brought in, may I offer G-1 in evidence.

THE COURT: You may. Any objection?

MR. MILIDES: None, your Honor.

THE COURT: It is admitted. May I see counsel please?

(Unreported sidebar conference.)

JOHN HOWARD ROGERS, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MULLOY:

Q Mr. Rogers, what is your occupation?

A I am cleck of the Orphans Court of Northampton County.

Q What is that?

A That is custodian, part of my job is custodian of the marriage records of our county.

Q I see, and did I ask—when you say you are custodian of the records, you mean you keep them on file?

A Yes.

[47] Q In the courthouse there?

A Correct.

Q And either you or people under your direction maintain these files and records?

A They do.

Q I asked you to bring with you a marriage license application No. 96981, Peter John Tomaino and Kathleen Marie Wilson?

A I have it.

Q Did you bring it with you? May I have that?

A It is the original.

Q Do you use the original?

A I do.

MR. MULLOY: Would you mark that, and I will substitute later?

(G-2, being a marriage license application, was marked for identification.)

BY MR. MULLOY:

Q I am going to hand you a document marked for identification G-2. Would you tell me what that is please?

A That is a marriage license application.

THE COURT: Issued when?

MR. ROGERS: Issued on the fourteenth day of June, 1966, to a Peter John Tomaino and a Kathleen Marie Wilson.

[48] BY MR. MULLOY:

Q And does it indicate who the father of the female applicant is?

A It says George Wilson, father.

Q What address does it indicate for Kathleen Marie Wilson?

A 4615 Charles Street, Easton, Pennsylvania.

Q Is this the marriage license application I asked you to bring with you today?

A It is.

Q And this is the one you say you took from your records?

A It is.

Q Of which you are the custodian?

A Yes.

Q Does the application indicate the date when it was filed?

A The day it was filed?

Q Yes?

A It was taken on June 14, 1966, and the license was issued.

Q What day was the license issued?

A June 17, 1966.

MR. MULLOY: You may inquire.

MR. MILIDES: If your Honor please, I have no questions of this witness. I intend to call him as a character witness on behalf of the defense. I wonder if I could use him for that purpose and not have him wait around, since he is a public [49] official in Northampton County Courthouse.

MR. MULLOY: I have no objection to that, your Honor.

THE COURT: You may do so.

DIRECT EXAMINATION ON BEHALF OF DEFENDANT

BY MR. MILIDES:

Q And you are clerk of the Orphans Court of Northampton County?

A I am.

Q Do you know Mr. George J. Wilson, Jr.?

A I do.

Q How long have you known Mr. Wilson?

A Approximately fifteen years.

Q Do you know other people in the community that know Mr. George J. Wilson, Jr.?

A Many.

Q Among these people what is his reputation for being a law-abiding citizen?

A Very good.

Q Among these people and to your knowledge what is his reputation for honesty?

A To my knowledge, good.

Q Among these people and to your knowledge what is his reputation for truth and veracity?
[50] A Good.
MR. MILIDES: You may inquire.

CROSS EXAMINATION

BY MR. MULLOY:

Q Where do you live, Mr. Rogers?
A I live in Palmer Township, 518 Greenwood Avenue, Palmer Township takes the mailing address of Easton, Pennsylvania.
Q How long have you lived there?
A Approximately seventeen years.
Q Where does Mr. Wilson live?
A Mr. Wilson lives at 46—I imagine at 4615 Charles Street, I am not positive.
Q You say, though, you are acquainted with him and people who know him?
A Yes, I know George.
Q Do you know his children?
A Yes, they go to the same school with my daughter.
Q How many children does he have?
A He has quite a few. I am not positive. I think it is six or seven.
Q Does he have a daughter named Kathleen Marie?
A Apparently.
Q You don't know that?
A No, I know his son. He is a retarded boy.
[51] THE COURT: Didn't you meet Kathleen Marie Wilson at the time of the application?
MR. ROGERS: No, I wasn't elected until 1967, your Honor.
THE COURT: That was not issued by you?
MR. ROGERS: It was not.
THE COURT: Issued by your predecessor?
MR. ROGERS: Yes.

BY MR. MULLOY:

Q Mr. Rogers, you say you have lived in the same place for over fifteen years?

A I said sixteen or seventeen years.
Q And how long have you known Mr. Wilson?
A About fifteen or sixteen years.
Q Has he always lived in the same place?
A To my knowledge, yes.
Q And his present address is where he lived, say, fifteen years ago?
A The last time I was in his residence was approximately sixteen years ago, and I haven't been at his residence in approximately six years, but I have been in his company a number of times.
Q The last time you were in his residence six years ago where was the residence?
[52] A It was on Charles Street in Bethlehem Township.
Q Does Bethlehem Township have a mailing address of Easton Pennsylvania?
A I think it does, yes.
Q Do you remember the number on Charles Street?
A I don't.
MR. MULLOY: I have no further questions.
MR. MILIDES: That's all.
THE COURT: Thank you, Mr. Rogers. Your next witness.

(Witness leaves stand.)

(Witness enters courtroom.)

MELVIN I. DALRYMPLE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MULLOY:

Q Mr. Dalrymple, where do you live?
A R.D. No. 4, Easton, Pennsylvania.
Q Do you know the defendant, George Wilson?
A Yes, I do.
Q How long have you known him?
A I have known him since high school in the forties, early forties.

Q Mr. Dalrymple, I am going to direct your attention to— [53] well, I will ask you first what is your occupation?

A I am in hotel management, hotel manager.

Q I am going to direct your attention to the period June to November, 1966. What was your occupation then?

A I was hotel manager.

Q And where did you perform this?

A At the Easton Motor Hotel in Easton, Pennsylvania.

Q Were you the sole manager?

A At that time, yes.

Q As manager what were your functions?

A Actually it was all administrative functions throughout the hotel both in the front and the back of the house, food, beverage, as well as rooms.

Q Did you have supervision of any affairs that might be catered there?

A Yes, I participated in practically every affair that was held in the hotel.

Q And did you have general supervision over the management of the hotel then?

A Yes, I did.

Q All that went on, the preparation of records, and the filing of records?

A Yes, I did.

MR. MULLOY: Would you mark this?

[54] (G-3, G-3A, G-3B, being a bill, were marked for identification.)

BY MR. MULLOY:

Q I am going to show you first a document and direct your attention to that which is identified as G-3A, and would you tell me what that is please?

A That is the check for the wedding reception of George Wilson's daughter.

Q How do you know that is the check for that wedding reception?

A Well, because, first of all, I am the one that made

the check out and I do have the names of George Wilson at the top.

Q In other words, the handwriting on that check—

A Is mine.

Q Is yours?

A Yes.

Q What does that check represent, what is it for?

A This represents the food, beverage, et cetera, that was consumed at the wedding reception.

Q What is the total that you arrived at?

A The total of the wedding reception was $2,233.15.

THE COURT: How much? You dropped your voice in the middle of it.

MR. DALRYMPLE: $2,233.15.

[55] THE COURT: Thank you.

MR. DALRYMPLE: You are welcome.

BY MR. MULLOY:

Q Now, in the normal course of your business, having prepared such a check, what would happen next insofar as the hotel is concerned?

A The check is recorded in the front office on daily work, and from that point goes to the accounting area for billing.

Q And what form does the bill take?

A Well, on billing what they do is to break down the entire check on a bill which is then sent to the patron.

Q I see. Now, you have in your hand a document identified as G-3. Would you tell me what that is please?

A That is the ledger card, which is a copy of the billing that was sent out to Mr. Wilson.

Q I see. Where is that ledger card kept?

A In the accounting office.

Q And how is it prepared, from what information?

A It is prepared from the check that I present.

Q I see. Now, you say a bill was sent out to Mr. Wilson?

A Yes, it was.

Q And how frequently was the bill sent out?

A Well, the bill would go out—when a bill is not paid

[56] within thirty days, each month the billing clerk repeats the billing.

Q Is there any indication that that bill was ever paid?

A Well, there is an indication on here now that it has been paid.

Q Why do you say now?

A Because it gives you the time when the credits were applied and the amounts.

Q When were the credits applied?

A On June 20th there was one thousand dollars applied.

Q When was the wedding reception itself?

A I don't recall the exact date, but it is probably on here. It was June 25th.

Q Now, looking at your G-3, when is the first payment made towards that?

A The first payment was made June 20, 1966.

Q Is that a normal procedure?

A It was a deposit on the wedding.

Q I see. Now, when was the next payment made with regard to the wedding?

A The next payment was made in November, 1966 in the amount of one thousand two hundred and thirty three dollars and fifteen cents.

Q And that completed the account?

[57] A Yes, sir.

Q Looking to that November payment, is it indicated how that payment was made on that record?

A Well, it is indicated that one check came in for two different accounts. There was one check for $2,024.09, and then of that check $790.94 was applied to another account.

Q Does it indicate where the check came from?

A It does not on here.

MR. MULLOY: Would you mark this G-4?

(G-4, being a ledger card, was marked for identification.)

(Exhibit shown to defense counsel and Court.)

BY MR. MULLOY:

Q I am going to show you a document marked for identification G-4. Tell me what that is, please?

A Well, this is a ledger card from accounting for a man by the name of William Burke who was a permanent guest at the Easton Motor Hotel.

Q Is that the original?

A No, this is not the original.

Q Do you know Mr. Burke?

A Yes, I do.

Q And did he stay at the Easton Motor Hotel?

A Yes, he did.

Q And does that indicate a payment of his account on or about [58] November of 1966?

A Yes, it does. This on November, 1966, again it has a check for $2,024.09, less $1,233.15, crediting him with $790.94.

MR. MULLOY: Would you mark this?

(G-5, being a city ledger, was marked for identification.)

(Exhibit shown to Court and defense counsel.)

BY MR. MULLOY:

Q I show you a document marked G-5 and ask you to explain what that is?

A Well, as checks arrive at the hotel, which they would come into my office, I would hand them over to the accounting clerk who would list the checks for city ledger or accounts receivable, listing the name of the person that the check would be for, the amount and then who has drawn the check, and this, in turn, would go down to the front office to be applied in the daily work.

Q I see. Now, when you say city ledger, what is a city ledger?

A A city ledger is actually the same as accounts receivable.

Q In other words, these are outstanding accounts for the hotel?

A Of patrons of the hotel.

Q I see, and what form did these accounts take in the hotel records?

A I don't quite understand.

Q In other words, what is G-3 in relation to a city ledger?

[59] A Well, these are the names of the persons, in other words, monies have come in to pay certain accounts in city ledger.

Q G-3 I said. Go back.

A Oh, excuse me. Well, as an example, on G-3, which is our which is a city ledger, well, in this instance, for Mr. George Wilson, he had a balance of $1,233.15, a check came in or monies came into the hotel to be applied to his account. These are listed on this last document which you gave me, G-5, it is listed and sent down to the front office for application.

Q Is that a list of all the payments to the city ledger account on that day?

A On that given day, yes.

Q What is the date indicated?

A The date is November 3, 1966.

Q And how many payments or payments on how many accounts were made on that day?

A There were five accounts being paid. Excuse me, there were four accounts.

Q Looking at the last two accounts, what were they?

A One for George Wilson in the amount of $1,233.15 and one for William A. Burke in the amount of $790.94.

Q Does it indicate the manner in which that payment was made?

A It indicates that a check came in from the electrical [60] workers in both cases.

Q Can you tell me what happened to those amounts or how they would subsequently be recorded in the hotel accounting system at that time, the one $1,233.15 and the $790.94?

A Well, they were applied to the individual accounts that they were meant for, both these accounts.

Q And that shows now on G-3 and G-4, the accounts payable bill for both Mr. Wilson and Mr. Burke?

A Right.

Q To clarify one thing, did I understand you to say that after a bill has gone unpaid for a month what happens?

A Well, it is constantly followed up by the accounting clerk by sending out a bill at the end of the month. However, also on my own part I had an aging accounts, thirty, sixty, ninety days, and we followed up with form letters, that is, in most cases. In some cases I did not bacause of knowing the persons or—

Q Did you in this case?

A Pardon?

Q Did you in this case?

A I can't say that I did. I don't recall.

Q You say you know Mr. Wilson?

A Yes.

[61] Q At the time you were manager of the hotel and, in particular, between June and November of 1966 was he present in the hotel on any occasion that you are aware of?

A Well, none that I can remember as any one given time, if he was, he was in and out of the hotel.

Q How frequently would he be in the hotel in the course of a week, just an approximation?

A I would say once or twice a week probably.

Q You said you had an aging account ledger. Is that different from the sending of a bill every thirty days?

A Yes, actually, my aging accounts, we use regular form letters we follow up thirty, sixty, ninety and over.

Q But that is separate and distinct from—

A From the accounting clerk, yes.

Q You send out a bill every thirty days on this?

A Right, that's correct.

Q I'm going to ask you to take a look at G-3A, if you will please?

A Yes.

Q Would you say it is prepared in your handwriting?

A Yes.

Q The second item there, could you read that to me?

A Seventy two bottles on a corkage charge of $2.60 per bottle.

[62] Q So that we understand what that means, would you explain it?

A Apparently, which we did permit, the patron to bring their own champagne or liquor into the hotel for wedding receptions. If they do this we would charge them a corkage charge.

Q This would indicate there were seventy two bottles brought in?

A Yes.

Q And there was also liquor and champagne purchased at the time of the reception, was there not?

A Yes, that's correct.

Q Is there any indication of how much champagne was purchased?

A Six bottles.

Q And how many bottles of sauterne?

A Fifty three bottles.

Q How many dinners were served?

A Three hundred and twenty one.

Q I am going to refer you once again to G-3. In whose name is that bill made out?

A Mr. George Wilson.

Q And for what address?

A 4615 Charles Street, Easton, Pennsylvania.

Q Is that where Mr. Wilson, the defendant, lived?

A Yes.

[63] MR. MULLOY: You may inquire.

CROSS EXAMINATION

BY MR. MILIDES:

Q As I understand it, Mr. Dalrymple, on November 3, 1966 you received a check in the sum of, or the hotel received a check in the sum of $2,024.09?

A That's correct.

Q And you had a permanent resident at the hotel at that time who owed you some money?

A That's correct.

Q And that was Mr. William Burke?

A That's correct.

Q And as of November 3rd the very same date that you received the check, he owed you $790.49?

A Ninety four cents, yes.

Q Is that correct?

A $790.94.

Q Your city ledger is simply a piece of paper which lists the people that paid their bills on that particular day. That is what it is, isn't it?

A No. Well, the city ledger payment list is what you are saying?

Q Yes?

[64] A Yes.

Q That's G-6, I believe it is.

A G-5.

Q G-5. Now, when they received the check in the sum of $2,024.09 was there any direction or, first, was there a covering letter telling which monies goes to where?

A I really can't answer that. I don't know.

Q Let me ask you this. Did Mr. Wilson ever tell you you were going to be receiving a check for some two thousand dollars to pay off my bill or pay off Mr. Burke's bill?

A No, not that I recall.

Q Now, I notice, if you will look at G-1, the check, in the sum of $2,024.09, on the lower left hand side it says re or in regard to Easton Arms, Inc., do you notice that?

A I don't have the check.

(Check handed to witness.)

BY MR. MILIDES:

Q Am I correct?

A That's correct.

Q And I also noticed that the account of Mr. Burke is addressed where, if you will look at that exhibit?

A Easton Arms, Inc., 208 Drake Building, Easton, Pennsylvania.

Q All right. Now, 208 Drake Building, Easton, Pennsylvania?

[65] A That's correct.

Q And is that the same address of the electrical workers union?
A Yes, I think so.
Q I notice that Mr. Burke's ledger says re Easton Arms, that is, G-5. I notice that G-1, the check in payment, says re Easton Arms, yet I notice that your city ledger says electrical workers. Can you explain that?
A No, I can't really.
Q Now, you said that arrangements were made, of course, some time prior to the wedding?
A Yes, sir.
Q And a deposit was required?
A Yes, sir.
Q Now, would you look at the ledger sheet for Mr. George Wilson and tell us when this deposit was paid and by whom it was paid?
A It was paid on June 20th, 1966 and the check was by William Burke for one thousand dollars.
Q So Mr. Burke had paid one thousand dollars?
A That's correct.
Q Now, did he pay that to you?
A Not directly, I don't think. I don't recall.
Q Do you know whether he paid it with his own personal check, [66] did he pay it by cash or how?
A Well, this indicates that it was paid with his own check or else cash.
Q Now, you said also that you have a—excuse me. You said the customer or patron then gets billed thirty, sixty, and ninety days, is that correct?
A They get billed, actually, they are billed by the billing clerk each month until it is paid. The thirty, sixty, and ninety days are really follow-up letters, form letters, that are sent out by my office.
Q All right. Now, did you send Mr. Wilson any follow-up or form letter?
A I don't recall. I don't recall whether I did or did not.
Q You said, I believe, that there was some discretion in that particular regard?
A That's correct.

Q If you knew the individual you wouldn't send the bill?
A That's right.
Q And did you know Mr. Wilson at that time?
A I did.
Q And tell me, was Mr. Wilson, were you familiar that at or about this time Mr. Wilson, the union in which he was a member was involved in putting up a high-rise or a garden type apartment complex known as Kennedy Gardens?
[67] A I had heard this because of Mr. Burke being there.
Q And you understood, did you not know, that Mr. Burke was the attorney for Easton Arms?
A That's correct, I did know.
MR. MULLOY: If we may, your Honor, a prospective witness just walked in and before any more questions are asked I would like to ask that she wait outside.

(Witness directed to leave courtroom.)

BY MR. MILIDES:

Q Mr. Burke lived in the hotel?
A Yes, he did.
Q Permanently. He was the attorney for Easton Arms involved in the garden, Kennedy Gardens project?
A That's correct.
Q Representing the non-profit organization, correct?
A I would say so.
Q And the bills that he would have, you would send to the address, the Drake Building?
A That's right.
Q Which is the same address for the electrical workers?
A Correct, sir.
Q Now, did not Mr. Wilson use the facilities at the hotel on numerable occasions to, for meetings with members of city [68] council, the Redevelopment Authority, with respect to the Easton Arms project?
A Yes, I would say he did.
Q Can you tell us on how many such occasions?

A I can't really. It was, he was there, as I say, once or twice a week, I know this.

Q On occasions, sir, can you recall were there occasions when the mayor was there, together with members of the FHA in order to get this project off the ground?

A I can't remember individuals, in other words, groupings.

Q Mr. Wilson didn't direct you how to apportion or cut up this check of $2,024.09, that is correct?

A That is correct, as far as I can remember.

Q To your knowledge did Mr. Wilson tell anybody in your organization, "You are going to receive a check of $2,024.09 and I want you to apply so much on my account and apply so much on Mr. Burke's account"?

A Not to my knowledge.

Q Well, did Mr. Burke make such a request or direction?

A Not that I can recall.

Q You don't know who did it?

A No, I do not.

MR. MILIDES: That's all.

[69] REDIRECT EXAMINATION

BY MR. MULLOY:

Q Now, you say you don't know who did it, and I think the question was to your knowledge. Are you saying you don't remember?

A I really don't remember, I don't.

Q Now, let's go to G-5. Well, let's pursue that you don't remember a little bit. Your testimony here today, how is it you can testify as to the things you have testified? Is it from memory or from reflection of memory or from the records you have before you?

A The records I have before me more so than anything.

Q Looking at G-5, I think Mr. Milides asked you a question with regard to Easton Arms and electrical workers. On G-5, which is the statement of the payments that came in on November 3rd, 1966, where it says electrical workers, what does that mean?

A That means that the check was made out—it was an electrical workers check.

Q I see. Now, I think you testified on cross examination that, and on direct, that Mr. Wilson was in the hotel frequently during this period of time, that he had other meetings at the hotel and the mayor and other people were there?

[70] A Yes, there were other city people which he would meet at the hotel for lunch.

Q Was this on a twice a week basis?

A I was averaging out about how many times a week I would see him in the hotel, in other words, in frequenting the dining area.

Q Was he having a meeeting every time you saw him there?

A I wouldn't say every time.

Q Let's look at G-3. In the event that Mr. Wilson were to have a dinner or a meeting at the hotel in the period of June 25th, 1966 to November of '66 and charge it to an account at the hotel or to his account at the hotel would it have appeared on G-3?

A Yes, it would have.

Q Is there any indication that he charged any meetings during that period of time on G-3?

A No, there is not.

Q Does G-3 indicate it was opened because, in regard to the wedding?

A Yes, it does.

Q Would that indicate that is the first time Mr. Wilson had an account there?

A Yes, it is.

Q Do the electrical workers have an account?

[71] A No, they did not, only Mr. Burke.

MR. MULLOY: No further questions.

MR. MILIDES: No questions.

MR. MULLOY: Thank you, Mr. Dalrymple.

THE COURT: May I have that?

MR. DALRYMPLE: Yes, sir.

(Exhibit handed to Court.)

(Witness leaves stand.)

THE COURT: Your next witness, please.

MR. MULLOY: Your Honor, I move the admission into evidence of G-2 through 5, which I had not moved previously.

THE COURT: Any objection?

MR. MILIDES: No objection.

THE COURT: They may be admitted.

MR. MULLOY: With your Honor's permission, I would like to substitute a copy of G-2. Mr. Rogers tells me that he would like to have the original of the marriage license application back.

MR. MILIDES: No objection.

THE COURT: You may do that. That is G-2?

MR. MULLOY: That is G-2, yes, your Honor.

THE COURT: I am already substituting a copy in my record.

MR. MULLOY: Your Honor, I think you indicated a [72] commitment at twelve fifteen.

THE COURT: Yes.

MR. MULLOY: I would suggest this would be an appropriate time for a break.

THE COURT: I think you are right. Ladies and gentlemen of the jury, I will dismiss you now for lunch so that you get a little bonus today. Normally we would sit until twelve thirty, but you may leave now and return to the courtroom at two o'clock.

Now, I would caution you that you are not to make up your minds about any aspect of this case. You have only heard a very small part of it. You are not to talk about the case either among yourselves or with anyone else and, should anyone talk to you about the case or attempt to talk to you about the case, I would want that fact reported to me immediately upon your return.

You may leave now and come back at two o'clock. Anything else, gentlemen, at this time?

MR. MILIDES: If we may approach the bench, your Honor?

THE COURT: I would be glad to have you.

(Unreported sidebar conference follows.)

NOW, at 12:12 P.M., Court recesses.

NOW, 2:40 P.M., Court resumes in the absence of the jury.

[73] THE COURT: Put this on the record.

MR. MULLOY: My purpose, your Honor, was to just indicate on the record that we have had a conference in your chambers. There was a conference, which conference was attended by counsel for the defendant and William Brady, counsel for Gloria Hunt and William Burke, and that at the conference the Government indicated that it intended to call both Burke and Hunt as witnesses, and that Mr. Brady indicated there was a substantial chance that either or both would plead the Fifth Amendment on the stand, and, in order to avoid a mistrial, the Government counsel agreed not to call them.

THE COURT: Now, may I ask one more question, gentlemen? Is there any reason why Mr. Brady shouldn't be allowed in the courtroom? He is a member of the Court and he is still here. I wouldn't like to keep him out just because we are barring witnesses.

MR. MULLOY: None whatsoever.

MR. LAUER: I think he left for the day, your Honor.

MR. MILIDES: Of course, he is welcome to come in.

NOW, 2:45 P.M., Court recesses.

NOW, 3:44 P.M., Court resumes in the presence of the jury.

[74] MR. MULLOY: Mr. Thompson, will you take the stand, please?

FRED THOMPSON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MULLOY:

Q Mr. Thompson, where do you live?
A Easton, Pennsylvania.
Q And what is your occupation?
A Electrician.
Q In such occupation do you belong to a union?
A I do.

Q What is that union?
A International Brotherhood of Electrical Workers, Local 367 of Easton.
Q Have you ever been an officer?
THE COURT: Mr. Thompson, you know these facts that you are stating very well, but nobody else in this room does, so will you take your time about answering and keep your voice up, please.

BY MR. MULLOY:

Q Mr. Thompson, how long have you been a member of the union?
A About thirty five years.
[75] Q All thirty five years with local 367?
A That's correct.
Q Have you ever been an officer of that union?
A Yes.
Q At what time and what office?
A I was the recording secretary off and on for nearly twenty years.
Q During the period of November, or June to November of 1966 were you an officer of the union?
A Yes.
Q What officer?
A Recording secretary.
Q Would you tell us, Mr. Thompson, first of all, is your union chartered?
A Yes.
MR. MULLOY: Your Honor, it is not my intention to move the admission of this as an exhibit. I brought it in merely to have him identify it. It is a union charter. It hangs on the wall of the union office and, if we tried to reproduce it, I am afraid it would deteriorate, it is so old.

BY MR. MULLOY:

Q Now, I am going to show you a document that is in a frame. Would you tell me what that is?
A That is our union charter.
[76] MR. MULLOY: Would you show it to the jury, please?

(Witness holds document up and shows the jury.)

THE COURT: Is this a Government exhibit, except that it will not be taken out of the frame or disturbed in any sense?
MR. MULLOY: I had not even contemplated, your Honor, making it an exhibit or keeping it here because of its importance to the union. I just thought if Mr. Thompson could read it and show it to the jury, that would suffice. Is there any objection of defense counsel to that procedure?
MR. MILIDES: None whatsoever, your Honor. Of course, we will have an opportunity to look at this?
THE COURT: Naturally. See it now, if you want to, before he talks about it.

(Document shown to defense counsel.)

THE COURT: I think in the future when you have a problem like this, you should make a photo copy of it.
MR. MULLOY: I am sorry. I just got back today. What had me concerned normally we would Xerox something like this, but that would crumple it. A photo copy of this is the only way we could do it, and that takes time.
THE COURT: Yes. What date is it?
MR. MULLOY: I will have Mr. Thompson give the date.
[77] THE COURT: All right.
MR. THOMPSON: This charter was issued in August, 1916.
THE COURT: August 16th of what year?
MR. THOMPSON: 1916.
THE COURT: And August, what date?
MR. THOMPSON: 15th.
THE COURT: August 15th of 1916.
MR. THOMPSON: I'm sorry, the second day of August, 1916.

BY MR. MULLOY:

Q Would you read the charter please, Mr. Thompson?

A International Brotherhood of Electrical Workers: To whom it may concern. RE: This charter issued by authority of International Brotherhood of Electrical Workers does grant to the following persons—and then there are a list of the charter members—and to their successors power to establish and to hold a union of the brotherhood to be located at Easton in the State of Pennsylvania to be known as local union 367 with jurisdiction as mixed over the following territory: Easton and vicinity. This charter grants the said union all power delegated by the Constitution. The conditions of this charter are such that it may be retained as long as five members in good standing comply with all the requirements of the Constitution and general rules of the International Brotherhood of Electrical [78] Workers unless reclaimed by the International Union. In witness whereof we have hereunto set our hands and seal of the International Union the second day of August in the year one thousand nine hundred and sixteen.

Q Who signed the charter?

A Dan W. Tracy.

Q And what was his position?

A He was the international president.

Q Thank you. I will relieve you of that. Has this charter ever been revoked or reclaimed?

A It has not.

Q That is still in effect?

A That's correct.

Q This is local 367, you say, of the International Brotherhood of Electrical Workers?

A That's right.

THE COURT: How long have you been corresponding secretary? You said for twenty years, but are you still the secretary?

MR. THOMPSON: No, not now, and that was not continuous. There were two or three terms in between when I was not an officer, and then I was reelected again at various times.

THE COURT: I see.

[79] BY MR. MULLOY:

Q Mr. Thompson, in the years 19—or in the year 1966 how many officers were there of local 367?

A There were seven.

Q What were they?

A The business manager, the president, the vice-president, the secretary, the treasurer, and three elected executive board members.

Q How many of those officers were salaried by the union?

A Only the business manager.

Q Did the business manager have another title at the time?

A No. Well, he was business manager and financial secretary, yes.

Q And you say of these officers only the business manager was salaried?

A That's correct.

Q In 1966 who was that business manager?

A George Wilson.

Q Now, were there any other people on the union payroll, in other words, they worked for the union and they were paid by the union as opposed to being paid by an electrical contractor?

A There were two people in the union office which were office help.

Q And who were they?

[80] A In 1966 it was Robert Brinker and Jean Sippel.

Q Was there anybody else in the union office at that time?

A Oh, yes, Robert Shaffer also.

Q Did they have any other position with the union, Mr. Shaffer and Mr. Brinker?

A Mr. Shaffer was president at that time and Mr. Brinker was treasurer.

Q Working in the office were they acting as president and treasurer or were they acting in some other capacity?

A They were acting as office help.

Q And could anybody have performed this job, not withstanding—strike that. Could anybody have held this job whether they held an office in the union or not?

A Any member of local union 367 could have held this job.

Q It did not have to be the president or the treasurer?

A No.

Q In working in the office to whom did these people report, that is, Mr. Brinker and Mr. Shaffer?

A They were responsible to the business manager.

Q And that was Mr. Wilson?

A Yes.

Q And who was responsible for the day to day operation of the office?

[81] A The business manager had charge of the office and the operations in the office.

Q Do you recall at that time who was authorized to sign checks?

A The treasurer, the president, were authorized to sign the checks.

Q Now, what function did your union perform or does your union perform, did and does your union perform?

A We place the electricians on the various jobs as contractors call for them, and we put them out for employment, and we supervise or patrol the jobs to maintain our conditions, working conditions and safety on the job.

Q Do you negotiate wage rates?

A That's right.

Q Do you handle grievances for the men?

A That's right.

Q What type of work did the men in your union perform?

A Electrical construction work, any type of electrical construction. We also have shop members who do motor winding and—

Q Speak up please. I don't think everybody could hear you.

THE COURT: I lost the last part of that answer.

MR. THOMPSON: We do electrical construction work, all types of electrical construction work. We also have shop members [82] who do motor winding and electrical shop work.

BY MR. MULLOY:

Q For whom do you do the electrical construction work?

A Any contractor who happens to have a job in the area.

Q Can you name some contractors?

A We have Lyons Electric, Easton Electric, Murray Electric, and Nordling Dean.

Q How long have you performed work for Nordling Dean or have your men performed work for Nordling Dean?

A I am not sure, but I think about sixty five, either 1964 or 1965, I am not so sure of the date.

Q Over what geographical area did the men represented by your union perform their work?

A We have Warren County and part of Huntingdon County in New Jersey, and Monroe County, and Northampton, part of Northampton County, part of, an upper portion of Bucks and a lower portion of Pike County.

Q And where are those latter counties?

A In Pennsylvania.

Q All right. Mr. Thompson, in and about the period of time we are talking about, 1966, did the union, that is, local 367 of the IBEW, get involved in any housing project?

A We built a low cost housing project known as Kennedy Gardens.

[83] Q And what structure was set up in order to build it, I mean, corporate structure? Did the union build it?

A To build this we had to organize a non-profit corporation which was, I would say, a subsidiary of the local union known as Easton Arms.

Q When you say, "We had to organize", who was we?

A The local union, 367.

Q And this was a non-profit corporation?
A That's right.
Q Did this corporation have directors?
A Yes.
Q Who was on that board of directors?
A There was myself, well, the officers of the union were the board of directors.
Q With yourself included?
A Yes.
Q Did Mr. Wilson, the defendant, have any position with Easton Arms?
A He was the manager of it.
Q The manager of Easton Arms?
A That's right, manager of the building. He was also president of Easton Arms.
Q Who worked for Easton Arms? Did anyone work for Easton Arms? Did they have any employees?
[84] A We had an attorney employed.
Q And who employed him?
A His name was Burke.
Q How was he employed?
A He was employed as our attorney.
Q Do you remember who employed him, who retained him?
A I think, really, the business manager employed him.
Q Would that have been Mr. Wilson?
A Yes.
Q Were there any other employees of the Easton Arms, Inc.?
A We had a secretary, Gloria Hunt.
Q To whom did she report?
A She reported to Brother Wilson, the manager.
Q Where did—you say Easton Arms, the purpose of Easton Arms was to build an apartment project called Kennedy Gardens?
A That was the sole purpose.
Q And you say the union instigated this thing and the non-profit corporation was, did you say, subsidiary to the union?
A Yes, it was within the union structure, yes.

Q Where did the funds for the operation of Easton Arms come from?
A The building was all financed by Government money.
Q Was there any other money, other than Government money involved?
[85] A The local union furnished some money to pay for attorneys' fees and various incidentals to set up our charter to incorporate.
Q And do you know how much money was involved in that?
A I think the total was around thirty, thirty one thousand dollars.
Q Was this to be reimbursed by Easton Arms?
A Yes.
Q Was it ever reimbursed?
A No, because the project failed.
Q Do you recall when the Kennedy Garden apartments were ready for occupancy?
A It was either late 1966 or early 1967. I am not too sure.
Q Do you recall how long Mr. Wilson remained as manager of Easton Arms, manager of Easton Arms, Inc.?
A Until the early part of 1967.
Q Until the early part of 1967. Did you hold any particular position on the board of Easton Arms, Inc.?
A No, I was only a director.
Q Do you recall any discussions at board meetings with regard to reimbursing Mr. Wilson for the expenses of his daughter's wedding reception?
A No, I don't recall any discussion of it.
[86] Q Were you aware that a check had been drawn on the union bank account for this reimbursement?
A No, beuase I didn't always see all the checks. If there were vouchers drawn—before every check was drawn there was a voucher drawn up. I signed the voucher. I didn't always see the check.
Q Now, I think, when you signed the voucher were you signing the voucher as a director of Easton Arms, Inc., or as an officer of local 367?

A All the vouchers were signed as an officer of local 367.

Q I see. As an officer, and were you like a member of the board of trustees of local 367, or whatever the governing body was?

A Executive board.

Q Do you recall any discussion with regard to the wedding reception as a member of the executive board of local 367?

A No, I don't.

Q When did you first become aware of the fact that a check had been drawn on union funds to reimburse the wedding reception expenses at the Easton Motor Hotel?

A I don't remember, I don't remember, probably when I went over the bills, because, as I received the bills, I drew up vouchers for them. If it was in among the bills, then I drew up a voucher for it.

[87] Q Well, do you remember this check?

A I don't recall it distinctly, no.

Q Do you remember that the union was going to reimburse Mr. Wilson for this reception?

A No, I don't recall it distinctly. That was six years ago. I don't remember.

Q You say you don't remember?

A No.

Q I am going to show you G-1 and ask you if you have any recollection of that check or of the voucher that was issued in support of it?

A I don't distinctly remember the voucher, but, if the voucher was written and signed, I must have signed it. I don't remember that distinctly from any of the others because I used to receive the bills, a bunch of bills. I would receive a batch of them and I would go through the bills and make up the vouchers, and I don't distinctly recall any particular one of that time.

Q Take another look at that check. You will notice it says re Easton Arms on it?

A Yes.

Q Do you see where it is marked re Easton Arms?

A Yes, I see it.

Q Does that mean anything to you?

[88] A All the vouchers and checks that were drawn that had anything to do with Easton Arms were marked as such because they were to be reimbursed by Easton Arms when the funds became available.

Q Did you see the bills that supported the Easton Arms vouchers?

A Yes.

Q You did see the bills?

A Yes.

Q You don't recall the bill for that particular check?

A Not distinctly, no.

Q Do you know what that check was for?

A No.

Q As you look at it today, do you know what the money in the check was for?

A No, I notice it is for the Easton Motor Hotel, but I don't recall just what it was for.

MR. MULLOY: No further questions.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. MILIDES:

Q Now, Mr. Thompson, let me take you back to 1966 when you were recording secretary. The union had a bank account in the [89] Easton National Bank and Trust Company?

A That's right.

Q Correct?

A Yes.

Q You were recording secretary of that union?

A That's right.

Q Who were authorized to sign the checks?

A The president and the treasurer signed the checks.

Q The president was Mr. Shaffer?

A That's right.

Q And the treasurer was Mr. Brinker?

A That's right.

Q Was anyone else authorized to sign checks?

A No, but they couldn't make out a check until I had first signed a voucher for it.

Q Now, I want to refer you to Government exhibit number one and I want you to look at it, if you will, and that is a check drawn on the Easton National Bank and Trust Company, correct?

A That's correct.

Q And the date of that check is November 1, 1966?

A That's right.

Q And the amount of that check is $2,024.09?

A $2,024.09.

Q And nine cents. Now, Mr. Shaffer as president could not [90] sign that check unless he had a voucher?

A That's correct.

Q Mr. Brinker as treasurer could not sign that check unless he had a voucher?

A That's correct.

Q That voucher had to be signed by how many individuals?

A That was only signed by myself.

Q So that there was a condition precedent to the signing or making of this check, and that is, namely, the existence of a voucher?

A I'm sorry, I misquoted. The president and myself had to sign the voucher.

Q Two people, so that you had to at some time go over the bill?

A That's right.

Q And the president had to at some time go over the bill?

A That's right.

Q Now, there has been testimony from some other witness that there were no bills submitted for Easton Arms, but just a list. Now, would you approve a voucher, would you execute a voucher if the bill was not attached to it?

A No. When I received the bills, as I said, when I received the bills I made out vouchers for them.

Q What I am asking you is, Mrs. Sippel testified that there is [91] a voucher in existence for this check and you recently moved your offices, is that correct?

A That's right.

Q All right, and now, sir, would you or did you execute a voucher for $2,024.09 to be paid to the Easton Motor Hotel if there was no bill, if there were no bill, excuse me.

A If I hadn't received a bill, I would not have made a voucher out.

Q Let me take you back again to 1966, sir. How many members were there in the union approximately?

A Oh, around six hundred or something like that. I am not too sure.

Q And I understand that Mr. Shaffer and Mr. Brinker actually worked in the office, is that correct?

A That's right.

Q And didn't Mr. Brinker have the title of office manager?

A I guess you could have called it that.

Q All right. Did he set policy within the office as Mrs. Sippel testified? Would that be a fair statement?

A It could possibly be because the business manager was on the road a great deal and someone had to have charge when he was absent, so I would say Brother Brinker had something to say about who managed the office.

[92] Q Well, Mr. Wilson's job was to promote work for the union and better conditions?

A That's right.

Q And promote the relationship between contractors and negotiate for you?

A That's right.

Q And there was no question in your mind that he was doing his job satisfactorily, is there?

A That's right, he was.

Q Now, the union then, Mr. Thompson, decided to sponsor a housing project?

A That's right.

Q Would it be a fair statement, sir, to say it was needed in the community of Easton?

A I think it was.

Q And you eventually became a director of a non-profit corporation that was formed by the union in order to satisfy the law?

A That's right.

Q So that you can engage in the business of low-housing?
A That's right.
Q Middle income housing, excuse me, isn't that so?
A That's right.
[93] Q Now, tell us some of the experience, the difficulty you experienced with respect to getting this thing off the ground? Perhaps, I can save some time. In order to even qualify you had to form a corporation and the name of that corporation was Easton Arms?
A That's right.
Q You had to hire a lawyer?
A That's right.
Q And the lawyer that you then hired was Mike Franciosa, is that correct?
A That's right.
Q He is now Judge of Common Pleas Court of Northampton County?
A That's right.
Q Do you recall going to his office?
A I do.
Q Do you recall the appearing in court?
A That's right.
Q Do you recall the matter being referred by the then President Judge Barthel to a Master?
A That's right.
Q Because it was a new concept and he didn't quite comprehend it, is that a fair statement?
A That's right.
Q And a Master was appointed by the name of Mr. Webber?
[94] A That's right.
Q And he sat on it, and he sat on it, that his Mastership was revoked, and then an attorney by the name of Williams was appointed?
A That's right.
Q Now Judge Williams of the Northampton County. Would it be a fair statement, sir, that it took some nine months even to get the charter for the non-profit corporation?
A It took nearly a year before we had that charter.

Q Now, you had to acquire some land, isn't that correct?
A That's right.
Q And the piece of land you acquired was on the south side of Easton and in not the most desirable area, is that correct?
A It was in a slum area.
Q It was in a slum area, and there were meetings, were there not, with City Council, members of City Council and the mayor, repeated meetings?
A Many meetings.
Q And there were meetings also with the Redevelopment Authority, its members and its executive director?
A That's correct.
Q There were meetings, were there not, in Philadelphia, in Newark, and in Washington, D.C. with members and representatives of the Federal Housing Authority?
[95] A We took many trips to Philadelphia.
Q And to HUD?
A That's right.
Q Now, as a matter of fact, the land was given to you by the city, for one dollar?
A That's correct.
Q And the history of that land was as follows, wasn't it, some three, four, five years ago it was sold for $25,000.00 and the developer defaulted?
A That's correct.
Q It was sold again for some four or five times, wasn't it?
A That's correct, because no one would follow up.
Q And the total redevelopment in the city of Easton at that time was considered a complete failure because there was not one redeveloper, isn't that correct?
A That's right.
Q Until your union was the first?
A That's right.
Q And isn't it a fact the Redevelopment Authority was in existence some twelve years and operating, condemning land without one piece of a redevelopment in the city of Easton, is that a fair statement?

A That's correct.

Q Now, in order to do this, to promote, to bring in redevelopment, [96] it was necessary, was it not, to meet with these people?

A It was, right.

Q O.K. Now, was it necessary to meet with architects?

A Architects, engineers, planners, many people.

Q Now, there were meetings that took place in the Hotel Easton, were there not?

A Yes, that's correct.

Q Many meetings, isn't that so?

A That was our meeting place when we met with the Government officials, Federal Officials.

Q And even before that you met at the Circlon?

A That's right.

Q Many meetings at the Circlon?

A That's correct.

Q And you met also at the Pomfret Club?

A That's correct?

Q There was a meeting at the Scandanavian Inn, another restaurant, on more than one occasion?

A That's right.

Q Now, there was a gentleman by the name of Mr. Gough, who constructed this place, there were meetings with him?

A That's right.

Q As a matter of fact, that acted as a co-venture with Mr. Nordling, wasn't it?

[97] A That's right.

Q And that's Mr. Nordling, the contractor, that was here, were you here this morning?

A No.

Q All right, fine, the electrical contractor. As a matter of fact, he put up this structure with Mr. Gough?

A He built it, yes.

Q Now, these meetings, these travels back and forth to Newark, Washington, took money?

A That's correct.

Q And a program was set up whereby your union would lend to Easton Arms enough money to get this thing off the ground for a much needed project?

A It will supply the money to get it started until the Federal Government started supplying the money.

Q Right. Now, from the time you got interested in the project to the time it broke ground, how much time elapsed?

A I would say a period of more than two years or so.

Q And from the time you broke ground until the time it was completed, how much time elapsed?

A Possibly a year.

Q OK.

THE COURT: Beyond the two years?

[98] MR. THOMPSON: Yes.

BY MR. MILIDES:

Q Or a total maybe of three years, perhaps a little longer?

A Very nearly that, yes.

Q Now, you had some problems with the federal authority with respect to restrictions and limitations and qualifications as to whom you could rent to, isn't that true?

A They placed so many restrictions on us they couldn't rent some of the apartments.

Q Now, it wasn't Mr. Wilson's fault that this thing failed, was it?

A No, it wasn't Easton Arms fault, it wasn't Mr. Wilson's fault.

Q It wasn't the union's fault?

A No.

Q Is that a fair statement?

A That's right.

Q Now, Mrs. Sippel has reported that some thirty eight thousand dollars was spent or loaned from your union, by your union to Easton Arms. Do you know of any of that money, any of that money which was used or misdirected?

A Not to my knowledge.

Q You approved the vouchers?

A That's right.

[99] Q You saw it. Now, at any time did Mr. Wilson come to you and say I want you to approve a voucher for some twelve hundred and thirty three dollars and fifteen cents because I am going to sneak it in and I am

going to beat the union for it. Did you ever hear tell of anything like that?

A No, because all the vouchers I made were from the bills that I received.

Q How long have you known Mr. Wilson?

A Oh, maybe twenty years, something like that.

Q Do you know other members of the union that know him?

A Yes.

Q What is his reputation with respect to honesty?

A I have never seen him do anything dishonest.

MR. MILIDES: That's all.

REDIRECT EXAMINATION

BY MR. MULLOY:

Q Mr. Thompson, I am going to show you a copy of Government's exhibit identified as G-3 and ask you if you recall that?

A Yes, I think I saw this bill.

Q Did you approve a voucher to pay that bill?

A Apparently I did.

Q Drawn on union funds?

A Yes.

[100] Q Did you talk to Mr. Wilson about that?

A I don't remember whether I did or not. I don't think so.

Q Would you look at the top of G-3 and to whom is the bill made out?

A Mr. George Wilson's name is on the top. Apparently he submitted the bill, but the bill wasn't made out to Mr. Wilson. I mean the voucher wasn't made out to Mr. Wilson.

Q The voucher was made out to Easton Arms Motel?

A That's right.

Q Did you know what that bill was for?

A No.

Q In other words, it was submitted to you and you just approved it?

A That's right, because all vouchers, all bills and

all vouchers are read before the local union and the local union votes on them to approve them.

Q So it was approved and you paid it?

A That's right, no bill is paid unless the local union approves it.

Q Now, you testified that there were numerous meetings with regard to this Easton Arms, Inc., Philadelphia, Newark, Washington, Baltimore. Was that with regard to getting it started, getting it off the ground?

A That's right, because we had all kinds of problems trying [101] to get the approval of federal funds to start this.

Q Was this even before you had purchased the ground?

A Well, it was during the time, before and after.

Q Before and after you purchased the ground?

A That's right.

Q Was it before you started the actual construction?

A Yes.

Q Where did the funds come from for the actual construction of the building?

A From a Government Agency. I think the Federal Housing Authority was the one in back of it. We dealt through two or three different agencies, but the Federal Housing Authority was the one that furnished the money eventually.

Q It was a mortgage, really, insured by the Federal Housing Authority, wasn't it?

A That's right.

Q Did you have these meetings, did these meetings continue after this building, after you got the construction financing and the building was begun?

A Yes, because there were numerous changes made in the plans after we had the money approved.

Q And the meetings were for the purpose of discussing changes in plans?

A That's right, we changed the heating system, made several [102] changes after the plan was approved.

Q How many people attended these meetings?

A The board of directors.

Q Were these meetings like luncheon meetings or dinner meetings?

A Yes.
Q At which the union picked up the bill?
A Yes, we were supposed to have been reimbursed by the Easton Arms, by the funds from Easton Arms.
Q But the union picked up the bill?
A That's right.
Q And at these meetings did you have architects plans and financing papers and other things to discuss?
A That's right.
Q And these were true business meetings, were they not?
A That's right.
Q And the sole purpose was to discuss the project, and that is all that was accomplished at the meetings?
A That's correct.
Q How many people would attend these meetings?
A Usually the seven, well, the five of us that were directors, and, after Mr. Burke came into the picture, he attended it, and then, whoever else was invited, the architect of the building or whoever the meeting was called to discuss the [103] problems with.
Q I see. Did the mayor attend these meetings, the mayor of Easton?
A Yes.
Q These meetings after construction started?
A He attended a couple of them, yes.
Q Were the meetings attended by, say, more than twenty five people?
A I doubt if there were more than twenty five people.
Q Would you say, would twenty be an accurate number at most of these meetings?
A Probably, yes.
Q Do you recall when construction started?
A I think 1965 it was. I am just not sure of these dates.
Q I am not trying to hold you to a specific date. I think you testified earlier that occupancy began at the end of 1966?
A That's right.
Q And I think you also testified on cross examination it took approximately a year to put up the building?
A That's right.
Q So would that mean construction started in 1965?

A About that, yes, that's right.
Q And at that time you had the construction financing settled?
A That's right.

[104] Q The meetings in Philadelphia, Newark and Washington, were they before or after the construction started?
A Both. We had meetings before and after it started.
MR. MULLOY: I have no further questions.

RECROSS EXAMINATION

BY MR. MILIDES:

Q It didn't—let me pick up where Mr. Mulloy is leaving me. There were also discussions, were there not, after you started your construction of building an additional seventy-five other units back to back on this project?
A That's right, we had started negotiations for the ground and started making plans for the additional ones.
Q But the City Council reneged?
A That's right.
Q And there were other meetings?
A Yes.
Q And then you also bought land across the river in Phillipsburg, New Jersey?
A That's right.
Q And there were meetings with respect to that?
A That's right, because we intended to build over there too.
Q I don't think I understood you, Mr. Thompson, when you said that did you see Government's exhibit number three, which is [105] the Wilson bill at the Easton Motor Hotel? Did you ever see that before?
A Yes.
Q Where did you see that?
A When I made out the vouchers.
Q But do you recall who gave it to you? Do you have any specific recollection?
A No, I don't exactly remember who gave it to me. It came in among the bills I had. Sometimes I picked up the bills at the office in a group.
Q So that what you are telling us and what you are telling his Honor, Judge Davis, is that George Wilson didn't give it to you to your knowledge?
A Not personally, no.

Q And you certainly had no conversation with him?
A No.
Q Concerning this?
A Not this, no.
Q Now, you would approve vouchers also for the payment to these other restaurants?
A That's right.
Q As well as other bills of the Hotel Easton?
A That's right. As I stated before, I would approve vouchers [106] for them, then they were put before the body for a vote, if the body approved them, they were paid, if the membership approved them.
Q Oh, yes, I missed something. I only understood that the bill is submitted to you, you make out a voucher, which is signed by yourself and the president, but then are you telling me the membership votes on it?
A That's correct, every bill the membership votes on.
Q So that the $2,024.09 check was voted on by the membership?
A It must have been.
Q And this bill, the Wilson bill, G-3, was attached to it?
A It must have been, or else it would not have been passed.
MR. MILIDES: I have no further questions.

FURTHER REDIRECT EXAMINATION

BY MR. MULLOY:

Q Mr. Thompson, a couple of questions. First of all, did you attend all of these luncheon and dinner meetings with regard to the Easton Arms project?
A Most of them. Occasionally I missed one, but most of them I would attend.
Q Did you attend the wedding reception?
A No.
Q Were you invited?
[107] A I don't remember whether I was or not.
Q One other question. These union funds in the union bank account, where did they come from?

A They came from the union members dues and assessments that we pay.
Q That is, they actually come from the members of the union themselves?
A That's right.
MR. MULLOY: No further questions.
MR. MILIDES: No further questions.
THE COURT: Thank you very much, Mr. Thompson.

(Witness leaves stand.)

MR. MULLOY: Your Honor, that completes the Government's case. The Government rests.
THE COURT: Do you want to start on your case?
MR. MILIDES: If your Honor pleases, there are some motions that I think should be made for the record.
THE COURT: Out of the hearing of the jury?
MR. MILIDES: Yes, your Honor.
THE COURT: Ladies and gentlemen of the jury, that will dispose of your service for this afternoon and you will come back tomorrow morning at ten o'clock.
Again I caution you that you are not to make up your [108] minds about any phase of this case because you haven't had it presented to you completely as yet. Furthermore, I don't want you to talk about the case with anyone and, if anyone should talk to you about it, I would want that fact reported to me immediately upon your return. With that word of caution, you may now leave, returning here at ten o'clock tomorrow morning. Thank you very much. Good night.
NOW, 3:26 P.M., Jury leaves courtroom.
NOW, 3:27 P.M., Court resumes in the absence of the jury.
THE COURT: If you have certain motions, you may present them.
MR. MILIDES: Yes, if your Honor please, the defendant moves the Court for a judgment of acquittal for the following reasons.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 71-587

UNITED STATES OF AMERICA

vs.

GEORGE J. WILSON, JR.

Before HON. JOHN MORGAN DAVIS, J., and a jury.

Philadelphia, Pa., March 16, 1972

SECOND DAY

Elizabeth P. Mensch
Official Court Reporter
3051 United States Courthouse
Philadelphia, Pa. 19107
WA 5-9480

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[116] FATHER JEROME J. PAVLIK, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MILIDES:

Q Would you state your name, sir?
A Father Jerome J. Pavlik.

Q And Father Jerome, you are with the clergy?
A Yes, sir.
Q And with which denomination?
A Roman Catholic clergy of the Franciscan Friars in Easton, Pennsylvania.
Q Now, Father, is there a friary in Easton, Pennsylvania?
A A friary and retreat house, serving the metropolitan area in Easton, Allentown, Bethlehem, and even Jersey.
Q And what capacity do you hold, sir, with that friary?
A I am the guardian or the major superior of this complex [117] at Shipmen Road in Easton, Pennsylvania.
Q And how long have you been a resident of Easton, Pennsylvania?
A This coming August first will be fourteen years.
Q Father, do you know Mr. George Wilson?
A Extremely well, sir.
Q And how long have you known him?
A At least twelve years.
Q Now, is he a member, sir, of your parish?
A We do not have a parish as such, sir, but our chapel is available to people of all faiths who have used it, and Mr. Wilson and his family have availed themselves of the spiritual facilities of our public chapel.
Q Aside from the use of the chapel and the use of your facilities, do you know Mr. Wilson individually?
A Extremely well, for this simple reason, sir, because I am his spiritual advisor and confessor.
Q Do you know other people in the community who know Mr. Wilson?
A Mr. Milides, please believe me, everybody knows Mr. George Wilson.
Q Now, sir, do you know Mr. Wilson's reputation in the community for being an honest, law-abiding citizen?
A Positively so.
Q And what is that reputation?
[118] A It is known by everyone with whom I have come in contact.

Q To be what, sir?
A To be beyond question.
Q Sir, do you know Mr. Wilson's reputation for being truthful?
A Yes.
Q And what is that reputation among the people that know him?
A Very well known, everyone that I talk to say that Mr. Wilson is worthy of credibility.
Q And with respect to veracity, would your answer be the same?
A Definitely so.
Q Now, have you had other contacts with him with respect to the friary?
A Yes, he has been extremely generous.
Q In what way, sir?
A We have a tremendous monument out in front of the friary, and Mr. Wilson was instrumental in performing gratis, thanks be to God, all the electrical work that was needed for the outdoor way of the Stations of the Cross, a tremendous monument on Highway 22, going east and west.
Q Would you kindly explain—perhaps I may be a little vague,—what you mean by the Stations of the Cross, sir?
A There are fourteen Stations, sir, and those depict or portray or help individuals who come there of every faith to meditate upon the passion, the suffering, and death of Jesus [119] Christ, Our Lord and Saviour, according to our Christian faith.
Q And are these electrically lit, is that it?
A Every night, on a time mechanism.
Q What contribution did Mr. Wilson make in that regard?
A He asked his men from his union which he represented, to come, and they donated of their time gratis.
Q Did Mr. Wilson donate of his time?
A Positively so.
Q Did you ever hear anything disparaging about Mr. Wilson's reputation for truth and veracity?
A No, sir, I wouldn't say that, I wouldn't say that,

I did not hear anything except what I read relative to this situation that is here now, sir, in the papers.
Q And what was your reaction when you read what you did read in the newspapers?
A Well, because I am this man's spiritual advisor, and without betraying a trust, I think I can safely say probably that I was totally and completely flabbergasted. Please believe me, ladies and gentlemen.
MR. MILIDES: You may inquire.

CROSS EXAMINATION

BY MR. MULLOY:

Q I have only one question, Father, and that is when was [120] this electrical work performed with regard to the Stations of the Cross?
A I wish I could pinpoint the exact year. I would say somewhere in the vicinity of maybe six years, seven years, maybe more, somewhere in there.
MR. MULLOY: That's all I have. No further questions.
MR. MILIDES: If the Court please, May Father Jerome be excused? He would like to return.
THE COURT: Yes. Thank you very much, Father Jerome.
FATHER JEROME: Thank you, your Honor, very much. Thank you, ladies and gentlemen.

(Witness leaves stand.)

MR. MILIDES: Mr. George Wilson.

GEORGE J. WILSON, JR., having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q Mr. Wilson, would you keep your voice up so the jury has no difficulty in hearing you, as well as the court stenographer and his Honor, Judge Davis? Would you kindly, sir, state your name?
A George J. Wilson, Jr.

Q And you are how old?
[121] A Forty eight.
Q And you are married?
A Yes, sir.
Q Do you have a family?
A Yes, sir.
Q And what does your family consist of?
A My wife, four girls, and a boy.
Q Now, Mr. Wilson, you are, you were sometime ago an electrician by trade, is that correct?
A That's correct.
Q Now, you, upon your discharge from the service in —when were you discharged from the service?
A 1945? 1945.
Q Did you go into the electrical trade then?
A Actually, I had been in the electrical trade prior to 1940 when I went into the service.
Q And did there come a time, sir, when you became a member of the International Brotherhood of Electrical Workers union of Easton?
A Yes.
Q And that was what number, sir?
A Local 367.
Q And when did you join that union?
[122] A In the middle 1940's when I got out of the service I was taken in as a member. Prior to that I had been working as an apprentice.
Q Did there come a time when you moved to the Easton area?
A I was born and raised in the Easton area.
Q When did you, sir, become business manager of that local?
A In 19, I think, 55 or 56, I'm not sure.
Q And you continued as business manager of that local until when?
A Until 1966.
Q At that time, sir—
A The latter part of 1966 or the early part of 1967 I drifted out.
Q Did you resign that position?
A I finally resigned, yes.

Q Now, did there come a time, sir, when you were encouraged by anyone to get involved in housing?
A Well, I would say that the encouragement came from within.
Q From within the what?
A From within the union as a whole.
THE COURT: Now, we are talking about local 367?
MR. WILSON: Yes, your Honor, 367.
THE COURT: Thank you.

[123] BY MR. MILIDES:

Q Now, in 1956 what was the membership of local 367?
A Between seven and eight hundred.
Q Now, would you tell us something about the structure of the union as it existed just before 1956 and the time surrounding these circumstances and events? In other words, what did it consist of?
A It consisted of the approximate number of members that I stated, it consisted of an organization that was functioning as it was chartered for.
Q Will you tell us something about the internal set up with respect to the number of persons on the executive board and what the personnel was and the procedure?
A Well, the union had a Constitution which was adopted as a national or international, if you will, conventions each four years. This Constitution stated specifically the duties of each officer and it also outlined the structure of the union relative to the officers structure. It was made up of a president, a vice-president and a recording secretary, a treasurer and a business manager and/or financial secretary, and an executive board.
Q And, in addition, an executive board?
A And, in addition an executive board.
[124] Q O.K. Now, how many in number would be on or were on the executive board?
A There were seven.
Q Now, you were the business manager for some ten years?
A Yes.

Q Now, what was your primary duty, what was your function as the business manager?

A My function was to establish friendly relations with the employers and organize the territory, and force the agreement, and, generally, look after things in the way of keeping the men working, establishing relations with other local unions in case we had a lull in work, then I could go to another local and ask them to hire my men, and then we would do the same for them in case of a shutdown. This was the friendly relations that had to be maintained. It depended on, I suppose, how well the business manager of any organization handles himself, because whatever he did reflected on the membership itself, and where a man's job is concerned, this is of extreme and paramount importance.

Q Now, how would the members, the members of the electrical workers union, the electricians, how would they be hired?

A They would be hired by signing an out of work list in the union offices. When a contractor would call in for men, the men were referred. It was known as a referral procedure. The men [125] were referred from the top of the list in chronological order to the contractor who had a right to reject them for any cause whatosever. This was to comply with the federal law. We cannot have a closed shop, hiring hall, as such. I had no control at all over who went where, but, if a man was rejected for cause, it behooved me to determine why, but I had no resource to a rejection. This was done on a final basis.

Q Would you represent the union if there were a jurisdictional dispute?

A Definitely.

Q Now, would you explain to the jury what is meant by a jurisdictional dispute?

A Well, frankly, it is complex, but, to put it in proper perspective, if a carpenter is doing electrical work on a union job, that is a jurisdictional dispute because the work involved comes under the jurisdiction of the electricians. For instance, when this building was built, when these lights were being installed, if a

general contractor did not hire an electrical contractor or, let's assume that these lights were an extra and he didn't want to hire electricians to do the job, he would put laborers or carpenters or whatever on the job besides electricians, then that would be a jurisdictional dispute and our men would be called in. If they didn't get the work, they would probably walk off the job. That's when you have a work [126] stoppage, when someone is doing your work. You might ask why, what right do they have to do this? This is their life and they served an apprenticeship, they went through training and they continuously tried to improve their skills, and this is the reason. If they can't do the whole job, they don't want to do any part of it.

Q Now, do jurisdictional disputes take other forms? By way of example, assume this light fixture also had attached in its peripheral area air conditioning—

A Then it becomes a joint situation. Not—

Q Where would the conflict of interest arise?

A Well, the conflict would arise that a tinsmith and an electrician would work jointly to erect the fixture.

Q Now, are these the kinds of problems that you would iron out for your union?

A Yes.

Q Now, are there also territorial disputes?

A Yes.

Q Explain to the jury what is meant by territorial disputes?

A Where a local union has a charter the geographical boundaries of the local union is clearly outlined within the confines of the charter. This geographical territory was designated by the international as being that area in which members of local 367 [127] had complete geographical jurisdiction. Any electrical worker coming within that jurisdiction that was done by a union contractor or done by a federal agency or a municipality where the jobs had to command a prevailing wage rate, and so forth and so forth, any activity within that geographical area would go to local 367. Now, where an out of town, an out of territory contractor—we colloquially refer to them as out of towners or visiting fire-

men—where a contractor would come, let us assume hypothetically in from Newark, New Jersey into Easton, Pennsylvania, he would come in and he would bid a job, he would be awarded the job. Then he would bring men in from Newark, New Jersey to do the job. That is a geographical, jurisdictional dispute. He is a signatory to the agreement approved by the International Brotherhood, but this gives him the right to go anywhere in the country and perform electrical work, but they must use the men from that particular area, and pay the wage rates that are bargained for in that particular area, and abide by all other aspects and conditions of the agreement which they are signatory to of that area.

Q In your hypothetical situation would you arbitrate if the contractor brought in electricians from Ne k, depending upon the work conditions in your particular area? Would you permit them to bring in men?

A If we didn't have men, of course, if we had men and they weren't the men that the contractor wanted, he wasn't bound [128] to keep them, he could reject them.

Q Now, you said that in 1966, sir, there were somewhere between seven hundred, did you say six and seven hundred or seven and eight hundred?

A Between, I would say between seven and eight hundred.

Q Between seven and eight hundred members. Now, where does the union get its money?

A The money was, all of the union money, came from the members.

Q In what form, sir?

A Dues.

Q And in any other form?

A And assessments.

Q All right, tell us what the dues were in 1966 and the year before that?

A The dues were voted by the members to be nine dollars a month.

Q And you say there are assessments. Will you tell us how that came about and what it was for?

A An assessment schedule was voted by the members to help defray expenses, of course, many many years ago.

It is continued in and it is a percentage of the net income of men working within the geographical jurisdiction.

Q And what was that percentage?

A I believe three percent. It would fluctuate according to the financial conditions of the local. If the finances got [129] frankly top heavy where we didn't need it, then it would be pushed off. It would be let out for awhile, and, perhaps, brought back in at one and a half percent or one percent. It would fluctuate. I believe it was three percent in 1967.

Q During the year 1965, 1964, how much money did your union take in from its members in the way of dues approximately and the assessment that existed at that time? Give us a range, sir?

A One hundred thousand dollars, one hundred and fifty thousand dollars a year.

Q And was it much the same for years prior to that?

A Well, it gradually came up, I would say in 1950 it wasn't that and, of course, when I went in the local in the forties, it wasn't that. We were operating on a shoestring.

Q When you undertook to become business manager what total was the membership in 1956 and 1957?

A About one hunderd and thirty.

THE COURT: It had dropped from six hundred?

MR. WILSON: No, your Honor. This was in '55 and '56 it was roughly one hundred and thirty, but in 1966 it had increased.

BY MR. MILIDES:

Q Now, Mr. Wilson, this work as business manager, did it take you away from the office?

[130] A My job was not to be in the office. My job was out on the street. My job was not in the office.

Q Well, the union did maintain an the office. Would you tell us for the record where that office was?

A Well, when I took office it was in a building on South Fourth Street in Easton. After we progressed we moved into the Drake Building in the city of Easton where we had offices for six years, I believe, that I can remember, and—

Q Now, Mr. Wilson, what were the territorial limits of the local which you managed?

A Well, in miles I would say—

Q Let's start with Easton as the hub.

A Perhaps we would say one hundred miles north to south.

Q All right. Easton is the hub. Going north went where, sir?

A It took in the entire limits of Pike County.

Q And that would be a distance of how many miles?

A Probably fifty, perhaps more.

Q All right. Going south?

A Perhaps again fifty because we went down south of Doylestown. I forget the route number, but it was south of Doylestown in Bucks County, and from east to west we took in Warren and Huntingdon County, New Jersey, and Northampton County, Pennsylvania. We went into Jersey and as far as, near Sommerville.

[131] Q O.K. Now, Mr. Nordling testified as a Government witness, the first Government witness in this case. Did you provide the men for him?

A Yes.

Q Tell us something about that job and the number of trips you made there?

A That job happened to be many jobs that Mr. Nordling had in our jurisdiction, as well as other contractors. The big job—Mr. Nordling, if I might point out, has a tremendous organization and he hires a lot of men. He had one electrical contract in excess of forty million dollars, one job alone, but that was outside of our territory in Summit Hill, New Jersey. I was president of the building trades in the state of New Jersey for our jurisdiction and also president of the building trades in the state of Pennsylvania for our jurisdiction. This job put me in the responsible position to decide jurisdictional disputes for all of the building trades, not only the electricians, and at one point at the Yards Creek job, which was a tremendous hydro-electro installation, and the electrical work was being performed by Mr. Nordling for New Jersey Power and Light, we had difficulties with

other crafts, mainly the operating engineers out of local 825 in Newark, New Jersey, who, for reasons still not clear, and that has been years ago, picketed the job, because I was president of the building trades, I was called in to [132] determine what to do, and I told them the picket line was not sanctioned by the building trades council, so, therefore, it was not to be recognized, of course. Then you open up some room for criticism. This was my function. I was called in wherever these problems developed and, as a result, we didn't pay any attention to the operating engineers on that particular job.

Q Now, were there other such jobs of similar magnitude in which you were involved as business manager for the local?

A Yes, many, many, many jobs.

Q Were there municipal jobs?

A Yes, schools, hospitals, universities. When I say schools, elementary, middle, high school, universities, nursing homes, theatres. You name it, and federal projects, housing for the elderly, and, probably, a problem or two developed on each job of any significant size. If there were three or more trades on a job at one time, I was constantly being called in to determine things that probably could have been determined by themselves, but I had to be the hatchet man. This was my job.

Q What was the employment experience of the members of your local, good or bad?

A No, the employment experience of our people was fine. Obviously, to be—no business manager prior to me —this is a fact, I am not elaborating here, I am just giving you [133] a fact—no business manager prior to my taking office had ever succeeded himself. There was no business manager who ever served two terms in the history of the local since 1916 until I took office, and I continued in office for ten years. Now, if you don't keep your men working, you are not going to get re-elected.

THE COURT: You are elected by the membership of the local?

MR. WILSON: Yes, your Honor.

BY MR. MILIDES:

Q Now, your union had a president in 1966?
A Yes.
Q What was his name?
A Robert Shaffer.
Q Would you tell the jury what Mr. Shaffer's condition is today?
A Mr. Shaffer today is terminally ill. Now, that means he is hopelessly ill, unfortunately.
Q Now, what position did Mr. Brinker hold?
A Mr. Brinker was treasurer of the local and in charge of the office.
Q Now, did you involve yourself with the internal affairs, the bookkeeping affairs of the office?
A If there is one thing that I will never involve myself with [134] if I don't have to, it is bookkeeping or internal affairs of an office.
Q Is your answer, sir, no?
A Yes.
Q Whose responsibility was that?
A The responsibility was that of the particular officer whose duties are clearly outlined in the constitution. In addition to me being business manager, I was also financial secretary, and it was also the thing that I should see to it that statistics were accurately kept and I was responsible for all monies collected by me until turned over to the bank or to the treasurer. This is all fine, that my duties ended when the constitution gave me the latitude to appoint assistants and delegate the authority, with the responsibility to do this. As a result, I appointed Mr. Brinker and put him in charge of the office and I said, "Look, you are the treasurer and you are in charge of this place. You do what you must do under the constitution. If you need help I will give it to you."
Q All right. Now, the president, do you appoint him?
A No.
Q How does he take office?
A He is elected.
Q And the treasurer, did you appoint him?
A No, he was elected.

[135] Q Now, unfortunately, Mr. Brinker is dead, is that correct?
A Mr. Brinker passed away.
Q Now, would you tell us something about the office procedure as you knew it to exist in 1966 with respect to the receipt of dues? What would happen to that, and the receipt of the assessments?
A Well, men would mail dues in usually quarterly, and a lot of them paid it out annually, too, and then receipts would issue and they would be mailed out to the men, and this was the responsibility of the person in the office.
Q And the person in the office was Mr. Brinker?
A Who had Mrs. Sippel.
Q And he was designated as business manager?
A He was office manager.
Q I'm sorry, excuse me. What was his official title?
A Office manager and treasurer.
Q Office manager and treasurer, o.k. Now, what is the procedure when statements or bills would come into the union for payment?
A They would be given to the recording secretary.
Q Now, the recording secretary what is that, what was his job?
A He's another officer whose responsibility is to keep the minutes of the meetings and to issue vouchers for any checks that were to issue on the union account.
[136] Q Do you recall how many signatures were required on this voucher?
A Well, I always thought it was one, but it was pointed out there are two. Mr. Thompson pointed that out.
Q What would be his function in signing or executing a voucher? What is that purpose, what is it sought to prevent or protect?
A I guess its a double whammy. I really don't know that much about bookkeeping procedures. I honestly don't, but the voucher, I know that at a union meeting the bill was presented by the recording secretary. The mail would come in and it would be handed to him. He would read these bills out.

Q Read them to whom, sir?
A To the membership.
Q And then what happened?
A Then the membership would, some of them would make a motion that the bills be, what was the statement, I make a motion that the bills be paid as read, and then a seconder to the motion, and then the president would call for a vote, and, if there were any questions, then the bill was laid aside and no voucher was issued. The recording secretary would not issue a voucher. I guess, again, going back just for a moment, I think in the old days of the union, apparently there was conflicts and they wanted that extra insurance there that the recording secretary if he was at loggerhead—it happened to me in the beginning, [137] frankly, because I didn't get my wages for like six weeks because the recording secretary didn't have a pencil or something. When I took over the reins of the local, the recording secretary was a hanger on from the old administration, and he was not in my camp, as such, and, as a result, I didn't get paid because he didn't make a voucher, and the president and treasurer couldn't sign the check until they got a voucher.
Q All right. You told us now that your local grew when you were there from a membership of approximately one hundred and fifty to some seven fifty. Did there come a time then when you were approached by, from within your membership, as well as from some people on the outside, some politicians, with respect to a program which was available for middle income housing under federal law 221 D (3)? Your answer, sir?
A I was not approached by politicians. The politicians were approached by me because I became cognizant of this legislation that came out as a result of a National Housing Act, and that's when I started my exploration of implementing the legislation, and I found out that—
Now, this was an entirely new concept in housing?
A Yes, it was a new concept.
Q Now, your membership was interested in this for what reason?

[138] A Well, we, not to wave a flag, but we know, we still know, we knew then more so because I was constantly urging at each meeting that we get into community affairs and where we can be a vehicle for providing any thing, if it just requires work on my part or work on the men's part, if it is not overbearing, we have a responsibility to do this to the public, and this is the way we got into it.
Q Now, in order to put up the housing which was later known by the name Kennedy Gardens, it was necessary to find a site, is that correct?
A Yes, sir, that's correct.
Q Was there such a site available that the union ultimately purchased?
A Yes.
Q O.K. Tell me something about the history of that site, where it was located, et cetera?
A The site was on Canal Street in Easton and it was in a terribly, terribly run down area, terribly run down. The Redevelopment Authority demolished the homes on the site in the fifties, in the middle fifties when they—this was their first big thing in the area, they demolished a lot of homes, and for nine years nothing happened to that land, except that they solicited developers, and the first developer they got [139] was charged twenty five thousand dollars for the piece of property.
Q Do you know the name of that developer?
A Delight Form, Inc.
Q Lingerie manufacturers?
A Yes. They were going to build and, of course, this was spread out in the papers and, after a year, they went into default. That meant that they didn't produce, so, under the laws, as such, they lost the land to the next developer who bought it for one half of what—
Q Well, it stood fallow, didn't it, in between until another developer—
A After a year they were in default, and then another came along, I believe it was the Mid Atlantic Corporation, I'm not sure. The Mid Atlantic Corporation, I am reasonably sure the figure was twelve thousand

five hundred dollars they paid for it. That money went to Delight Form, that twelve thousand five hundred dollars, so Delight Form lost twelve thousand five hundred dollars in getting the press that they wanted that they were going to be the developers. Then came a Mr. Robert Cerstell.

Q Associated with what?

A He is president of Alpha Portland Cement Company. He bought the property.

[140] Q What did he pay for it?

A Three thousand dollars.

Q What did he do with it?

A Nothing.

Q He lost his three thousand dollars?

A That's correct. He got one dollar that we paid for it finally.

Q All right. Now, how large a site was this? City blocks, what was it?

A One city block.

Q A complete city block?

A Yes.

Q Now, having a site for one dollar and having a desire to put up some housing, what happens next?

A Well, the next move was to find out how we could implement the law.

Q O.K. Now, did it become necessary to form a non-profit corporation?

A Yes, that's quite correct.

Q Tell us the problems and the difficulties you had?

A We went before the Honorable President Judge of Northampton County.

Q Judge Barthol?

A Yes.

[141] Q And you were represented by whom at that time?

A Attorney Franciosa, who is now a judge.

Q What happened?

A Judge Barthol found this was a little too complex, too time consuming, and it was, because it was Government, and he referred it to a Master, or he referred it

to an attorney first and then it went to a Master hearing, who is now Judge Williams.

Q And in the process how long did it take—?

A I think nine months.

Q Nine months, O.K. Wasn't the difficulty as well as the novelty in the interpretation of the law?

A Yes. Pardon?

Q Wasn't the delay caused by the newness of the law.

A Yes, absolutely.

Q And the inexperience?

A No question about that. No one knew anything about it.

Q Now, the master had to be paid?

A That's correct.

Q The attorney had to be paid. Judge Williams, ultimately, when he was an attorney, had to be paid as well as Attorney Franciosa had to be paid?

A Yes.

Q Did there come some arrangement between the union and the non-profit organization which was, incidentally, named what, [142] sir?

A Easton Arms, Inc.

Q As far as the advancement of monies from the union for the payment of these expenses as they were incurred?

A Yes.

Q If you nod your head, Mr. Wilson, the stenographer can't take it down. You will have to answer yes, if the answer is yes.

A Yes, and an arrangement was made.

Q All right. Now, tell us some of the problems, tell us what you experienced? Who did you contact first, FHA, HUD, Housing, City Council, what happened?

A A lot of things happened.

Q I want you to take your time and I want you to tell this jury some of the experiences that you had with respect to "red tape"?

A I will try to be as brief as possible, but I can assure you the red tape that I encountered in trying to get this program off the ground, you wouldn't believe, I'm sorry, you wouldn't believe.

Q All right, why don't you start?

A The first move, of course, was basic, it was elementary, it was easy. I went before my local union officers at an executive board meeting and generally outlined what I thought [143] would be a good gesture on our part, a good responsible activity to be involved with, and also in a selfish vein, something that could, perhaps, in forty years, again, forty years, pay off for the local union members.

Q Now, I am a little confused. Do I understand that the land under this program, the building is restricted for forty years, is that what you mean, and that then it reverts back, goes to the union?

A Yes.

Q O.K., fine. So how would it benefit the union after forty years?

A Well, the equity, properly maintained, seventy five apartments built under the building codes required by the Federal Housing Administration are very stringent codes. After forty years this could possibly be, properly maintained, again, a much better building than it was when it originally was constructed because bricks don't wear out, really.

Q What would happen to the equity after forty years?

A After forty years it would revert to the non-profit corporation for any activity whatsoever. We could actually sell it, if we wanted to, or the rents collected would be ours, would go into Easton Arms treasury, and could be used unilaterally for a pension fund for the members.

Q And is that the purpose, was that the purpose that the [144] monies were to go into the pension fund forty years later, is that correct?

A Yes.

Q All right, fine. Go ahead.

A And the reason I wasn't bashful about stating this, I didn't think that I was going to be alive in forty years. So what I was doing was providing for the next guys, and nobody on that board I don't think will be alive in forty years, so what we were doing, it wasn't a self-centered thing. We were providing for immediate

needs and we were secondarily providing for something that could ostensibly help the members coming along later. This seemed to be a good marriage.

Q What happened next?

A Well, I presented this to the board and in that fashion and they said, "Great, this sounds real good." I had to convince them that the administration meant business when they wrote this law and, apparently, I did because they said, "Well, go get them. What do you want to do?" I said, "Well, we are going to need money. We need money, we need front money. We need seed money. You just can't operate without money. You can't go waltzing around Washington, banging on doors, and do it with no money."

Q Well, you had to get an architect too for renderings and that type of thing, isn't that true?

[145] A Not prior to the feasibility study.

Q Well, there had to be a feasibility study?

A But before we got to feasibility, which is the filing of a form, actually, we had to determine so many other things. If you just walk into the regional office of the FHA in Philadelphia with a form and lay it on whomsoever's desk and say, I want to implement the legislation provided", nobody will give you an answer, nobody.

Q Tell us then, tell us in your own words the experience you had next?

A I had, first off, I had to start at the top. I had to go to the FHA officials elsewhere at the Washington level, at the zone. See, FHA is broken into top, and then zones, and regions, so I was scatter hitting. I didn't know where to go, but, finally, I started to see some light and, again, all of this I would keep reporting back to my board, and I would take them, if necessary, to a joint meeting. I would take the Democratic City Chairman, I would take the Republican County Chairman. I would take anyone that I could use politically to get this thing across, and I am sorry to say that all it was was political.

Q Now, did you find it necessary to meet with, take the Mayor of the city of Easton and some other people

to meet Senator Rooney, to meet a gentleman by the name of Mr. Prothro?

A Yes.

[146] Q What was his official capacity?

A Mr. Prothro was the general counsel for the Federal Housing Administration. This is the top level of the FHA. He was the attorney who advised the commissioner, Mr. Bronsteen. Now, these men are in charge of the entire country, the entire fifty states, on any matter that comes under the Federal Housing Administration, and it is a vast, vast empire. They do not know what goes on at the lower levels. They have no way of knowing. The lower levels, there seems to be, as I in my opinion, a tremendous lack of communication between levels, and this is where the red tape comes in. If you go in and try to get something done you're referred from this guy to that guy to that guy. You wind up talking to yourself, you end up talking to yourself. When you go to the top, they say that's not our responsibility, that's supposed to be, they push and shove, back and forth. This is not said disrespectfully to any individual whatsoever. I was treated with kindness. I can't say compassion, because compassion would not fit in here, but I was treated courteously, and leave it go at that. I met with Mr. Prothro and Mr. Bronsteen and I also had the Mayor of Phillipsburg, New Jersey, Joseph Brennan, with me because we had purchased property in Phillipsburg, New Jersey for a pittance, and today it's worth quite a bit of money because it is still ours and nothing had been done with it thankfully.

[147] Q Who else was present, anyone from City Council?

A Jay Snyder.

Q What was the purpose of that meeting, where did you meet?

A Oh, Senator, Congressman Rooney was with us. We met Mr. Bronsteen at his office at the Ivory Tower, the top.

Q At that meeting was it expressed by all parties present the need for housing in the area?

A Yes, very much so.

Q What happened next, Mr. Wilson?

A Well, chronologically I have a tough time putting these things together, but it was a happening, it was a continuous thing, there was no let up. I was seven days a week, twenty five hours a day on this. There was no let up. If it wasn't one thing, it was another.

Q In the closing, do you know what I mean by the closing?

A Yes.

Q First of all, what was the total cost of this project?

A Roughly one million dollars, nine hundred and ninety some thousand dollars.

THE COURT: The Government was providing how much of that?

MR. WILSON: The Government, your Honor, was insuring the loan for one hundred percent. It was one hundred percent [148] financing.

THE COURT: All right.

BY MR. MILIDES:

Q Before the closing they had another closing which they called a dry run. Do you know what I mean by that?

A Yes.

Q Will you explain to the jury what is meant by the dry run and what was requested?

A Well, a dry run is like in the Army when you go up to a firing range with your rifle, but you don't have any bullets in it, and you aim and you go bang, bang, bang. You don't hit anything because you don't have any bullets. That's what we did here in Philadelphia. We had a tremendous entourage of people who sat around a huge table and we all went through motions like we were going to have a closing. This means we are going to arrange for finances to build this tremendous nine hundred thousand project.

Q There was a list of some twenty one documents, isn't that correct?

A Oh, yes.

Q That your attorneys who represented you there had prepared and brought?

A Yes.

Q At that dry run recommendations were made, is it not true, [149] with respect to at least half the documents as far as changing the language and dotting the i's and making commas, isn't that so?

A There was one delay in an i not being dotted, as I recall, and I mean that literally.

Q Now, the purpose of the dry run was that so that it wouldn't hold up the actual closing?

A Yes.

Q Now, when you had the actual closing you had another man in charge of it, isn't that correct?

A Yes, that's correct.

Q O.K. Now, what was your experience with the second closing, the actual closing?

A Well, the first dry run was wetter than the second dry run, as I recall it.

Q What happened next, how long did that closing take?

A I don't know whether it took a full day or two full days.

Q All right. What happened next?

A Next?

Q Tell us some of the problems you experienced on the local level?

A Well, the local level—

Q With the Housing Authority and with—

[150] A Well, it seems when you're doing something right everybody wants to be on your team and, when things go wrong, nobody wants to get near you. I went back to Easton, Pennsylvania with—see, now I'm batting around, but to get the commitments from the FHA at the level here, this was ridiculous.

Q Tell us about it?

A Thomas Gallagher in 1966 was Regional Director of the FHA here in Philadelphia and I got to be George and he got to be Tom. It seemed that I was the only project in the region, but I could not seem to get a letter of commitment out of Mr. Gallagher until I came down with a man who was Democratic City Chairman, Jay Snyder, and I remember this vividly. I called at least

three times and I was told by Mr. Gallagher that the letter of commitment had issued and it was mailed to me. I said, "Mr. Gallagher, I did not, I did not get the letter." He said, "Well, my secretary must have made a mistake. She probably sent it to the wrong place." This was so important, this was so important, to wit, with that letter of commitment from the FHA, that simply meant that O.K. they will commit, but there are many things that have to happen after that, but this is one step on the road to the way.

I needed that letter badly. We were committed, we were committed as a non-profit group, as a local union. I was committed. I mean, I'm going around blowing my horn on behalf [151] of the local that we are going to do something that we knew should have been done a long time ago. It really should have been done, but, without that letter, all was lost. So, finally, Mr. Gallagher told me his secretary made an error.

I called his secretary and I got the run around there. I didn't get a yes or no, and, finally, I called him back and I said, "Please, if she made a letter, she must have a copy. Give me a copy of it." I said, "Better than that, I'll come down to pick it up." Jay Snyder and I went to the regional office in Philadelphia and to the secretary and she didn't know what I was talking about, and she said to me, "I'll get hold of Mr. Gallagher. I finally got one sentence in the letter. The letter should have been framed. It was a real collectors item. "Commitment will issue for the Kennedy Gardens project." That's all it was.

There was still a myriad of form work, a myriad of plans. So, O.K., I got that, and then we, going a little ahead now, I will have to go back and forth. I got the commitment. Then we went to the—I'm sorry, I got the letter, the letter read, "Commitment will issue shortly." There is no definite time and that shortly developed into time, and I had to go back and forth with them again. Finally I got the commitment. Now, I take it into our local banks. This is a Government insured loan. This is money in the bank's bank, and [152] that's all they are in business for is to make money, lend money and

make more money. They don't like to lose money. Well, you can't lose money on a Government insured loan unless the Government goes out of business, and I frankly don't think that's going to happen, but, when I went to the bank in Easton, Pennsylvania, first off I was told that their lending capacity did not, well, actually it would preclude, it would not allow them to lend that much money at one time. I said, "Well, joint, there's other banks in town. They are all banks." So, O.K., now out of protocol, reluctant courtesy, they formed a group of all of the banks and now we have got the lending power. Among all of them they can certainly come up with nine hundred thousand dollars at an interest that was attractive and a positive loan. So, I went before them and they told me matter of factly that they would give the loan contingent upon us putting up, I believe the figure was thirty five thousand dollars cash, and I questioned why because this wasn't part of the federal program. They said, "Well, this is part of our program, because during the building of this thing, if it gets built, you might have a strike and this money will be used to —" We are going to strike against ourselves? We are building our own building, but this was part of the red tape that I tried to get through, but I couldn't. I was up against a stone wall. I could not get through.

[153] I spoke at a later date to Sargent Shriver. If you recall, he was with President Kennedy. He became Ambassador to France, but at the time he was Director of OEO, Office of Economic Opportunity. He was a director of a federal agency and held in high esteem in Government. I met him personally and I said to Mr. Shriver and he said, "Well, what did you expect, what did you expect from the banks in Easton, Pennsylvania? And he gave me an education. I have been around but I have never been around at that level. We had more people against us than we knew. The real estate people didn't want us. They didn't want a local union to sponsor a non-profit housing project where the rents would be pro-rated on the actual cost of construction, and nobody is going to make a profit out of it. This doesn't make sense to them. It made a lot of sense to us. It

made no sense to them because I was told by a very prominent realtor at the time, "What are you doing? I have got these apartments I can't even rent and you are going to put some more up?" I said, "Yes, if we can." I said, "They aren't three floors up with cold water and the amount of money you are charging, it's ridiculous. They are vermin infested. They are dumps. They are slumlords." They don't care about that. They look at their big house and they want to look at the bank account, that's all they want to hear.

Before City Council I spoke at length. City Council [154] was on our side after we did a thorough, convincing job that this was needed, but you would be surprised of the people who would say, "Yes, we really need this," but when the chips are down, we need it, but you do it. Don't get me involved. I'm a stockholder here, I'm a stockholder there.

Q What are the things you had to do to get these people together?

A Frankly, wine them and dine them and convince them the world was a nice place to live if you had a decent place to live in.

Q Were there meetings, sir, at the Hotel Easton?

A Yes, many meetings.

Q And the people who would come to the Hotel Easton were the people interested in the project or were instrumental to it on one facet or another, is that correct?

A That's correct.

Q What other places were there such meetings?

A The Circlon Restaurant was the most convenient to the Drake Building, but the space was limited. The space was limited but it was large enough for the most part. If we had a big operation, we couldn't hold it at the Circlon, but small ones, it was big, but it was the wrong size. We did use the Circlon and the Hotel.

Q The bills at the Hotel Easton were they passed on by the membership with vouchers and were they passed on?

[155] A I would have to say yes because that's what the Constitution calls for and, if they weren't done that way, any member of the local union can prefer charges

against—and it is clearly outlined in the Constitution. I had charges preferred against me for various wrongdoings. If the local union would set a thing that I had to be on the job at nine o'clock on Tuesday morning for a jurisdictional thing and that was a motion and I wasn't there and couldn't give them a good answer, they could prefer charges against me. We were controlled by that Constitution, and God help any officer who did not comply with the rules, because there was always somebody reading that Constitution in between the lines hoping to get a wedge against some one so that he could come into perhaps a better position.

Q The Circlon bills likewise had to be approved by the membership?

A Any bills.

Q Were there other meetings at other places other than the Hotel Easton and the Circlon?

A We had meetings all over the place.

Q Were there meetings at the Pomfret Club in the city of Easton?

A Yes, the Scandinavian Inn, various places in Washington, D.C. I don't even—the Congressional Club or Hotel.

Q How many trips did you have to make to Philadelphia?

[156] A A lot of them, a lot of them, fifty, sixty.

Q Now, you told us that the novelty and the inexperience of the judicial part of it in Northampton County caused the delay of nine months in getting your charter. How about all this legal work that had to be done in filling out these applications? Did there come a time when the membership of the union or the executive board decided to hire a lawyer?

A Oh, yes. This was done after I discovered that I was batting my head against the wall. I am a construction man. Call me whatever you will, but don't call me a lawyer or a bookkeeper. So I knew that putting together a program of this magnitude, scope, or with these problems peculiar to the Government, that I don't know anything about, I needed a specialist. So I started inquiring around, and I don't really know how I did it,

but I found that there were people who made a living just making out forms for the Government. As a matter of fact, the Redevelopment Authority in Easton, they have an annual form, an annual request for funds, it's an annual package of paper that the Redevelopment sits, the solicitor, they are all there, and they have all their power that be, and they have all their people working and everything, and they have to put together this package and send it in to Washington.

Q Their annual budget?

A That's correct. Do you know who puts that together for them?

[157] Q A solicitor?

A No. They have to hire a firm, a professional firm to make out their forms. Granted, the form is really complex, but no more complex than ours. The Government seems to make everything complex.

Q Did you then come across the name of Mr. Burke as being an expert?

A I did. Mr. William L. Burke had his office in Washington and I met him, and he thoroughly convinced me that he was knowledgeable enough with the 221 D-3 Program to put our package together. I went back and I reported to my executive board, which was all—you see, the officers of the local and the officers of Easton Arms were one and the same and had the same function. I was the business manager. In no case did I have a vote. I had a voice, but that is not the important thing. The vote is the important thing, and the little guy who would sit there and say nothing, if he voted no, that was it. I could blow off all I wanted, but if he said no—there were seven guys who determined whether I was right or wrong, and there is where a selling job came in at the level.

I went back and told them I met Mr. Burke and I felt that he could do a job. He came up, he met with us, and he was hired contingent on what legal fees were involved, two thousand dollars I believe the Government provided for in the package, legal and organizational.

Q All right, let's see if we can't—then bills were [158] presented to a secretary, is that correct, of Easton Arms? Did Easton Arms have a secretary?

A Yes, Mr. Burke had a secretary.

Q Excuse me, Mr. Burke had a secretary?

A He was our counsel. He was our solicitor.

Q All right. Mr. Burke's secretary's name was what?

A Gloria Hunt.

Q Was she employed by Easton Arms?

A Well, she was paid by Easton Arms, but employed by William Burke. Easton Arms did not hire her.

Q I understand, O.K. And the bills that were due with respect to Easton Arms, do you know how they were paid? I heard Mrs. Sippel testify and I heard Mr. Thompson testify. Do you know the procedure?

A No. If the bills came in, bills were mailed to the office and Bob Brinker would open the mail and he would however get them to the recording secretary who would take them to the meeting, and, frankly, I never paid any attention. I get my check and—

Q Do you know whether or not a list was given to Jean Sippel for the bills themselves?

A There were times that I wasn't in that office for eight or nine weeks. I was out on the road. I did not know anything about [159] lists, or what to type. I didn't get into it because, if I did, I would be constantly demanded of my time, and I just didn't, I had people working there doing that.

Q Mr. Wilson, perhaps this might be of note. You got paid by the union as being the business manager?

A Right.

Q What was your salary, sir?

A I got the rate of pay that was paid to a general foreman. That was one dollar over the journeymen's scale, and in 1966 that was, I believe, five dollars and seventy five cents an hour, and I got paid on a forty hour week, no overtime.

Q Now, during this period of time you were doing your union work, right?

A Yes.

Q Business agent as well as this other work?

A As well as the work for the building trades, as well as the work for Easton Arms. I was a pretty busy guy.

Q O.K. Now, there came a time that you made plans for a wedding, is that correct?

A There came a time when I was party to planning for a wedding.

Q O.K., excuse me. Your daughter had an engagement party with her fiancee?

A That's correct.

[160] Q And tell us how many people attended that engagement party?

A No more than sixty. I would think no more than sixty.

Q And was that a list of both the bride's guests and the groom's guests?

THE COURT: Your nods cannot be recorded.

MR. WILSON: Yes.

THE COURT: Unless you speak out, they won't hear you.

MR. WILSON: Yes.

BY MR. MILIDES:

Q And then these people decided to get married?

A Yes.

Q And the wedding list was made out?

A Yes.

Q Now, initially, the wedding list was made up of how many members, how many people?

A I don't know. The wedding list, the wedding list?

Q No, no, initially, in the beginning, how many people did you intend to have?

A There would be less than one hundred for a positive fact. There would be less than one hundred people. If I were to say there would be sixty, I don't know, but I said there were sixty at the engagement party, and I think that would be a representative number. That is the full group. I don't know who else [161] would want to come. They would have to bring a gift.

Q All right. Was there then a meeting with Mr. Brinker and with Mr. Shaffer with respect to invite other people to this wedding?

A Well, this was brought up, this was brought up generally with the officers. It was mentioned, and I mentioned, as I recall, I mean, it was a general discussion amongst construction men, and I suggested if they wanted to come to the wedding they were perfectly satisfied to come, but some didn't. Mr. Thompson, who testified here the other day, he certainly was invited and he didn't come because Freddy isn't too social minded, you know. He didn't come—

Q What happened?

A Well, most of them came. A lot of the members who had positions other than officer positions. The chairman of the apprentice committee, the chairman of the auditing committee.

Q Did you have, Mr. Wilson, discussion about inviting people of importance with respect to Kennedy Gardens? That is what I want to know?

A Yes. There was—this was during the time when we were involved in trying to get tenants for Kennedy Gardens and was when we were shooting across trying to get seventy more units of apartments for Kennedy Gardens. That would be back to back [162] on Kennedy, and also trying to kick off the nursing home under Section 232, and also over in New Jersey where we had already purchased property. We were already involved in this and I thought this would be a good thing after it was generally discussed, and we decided amongst us it might not be a bad idea to invite everybody who could possibly give us a hand, the mayor of Phillipsburg, the mayor of—anybody who had any municipal control, any control that would make it easier for us to go to the Federal Government and say yes, we have cooperation.

Q Were there members of City Council present at that wedding?

A Yes, sir.

Q Were there members of the Housing Authority present?

A Yes.

Q Were there members of the Redevelopment Authority?

A Absolutely.

Q Were there people that ordinarily you would not invite to this wedding present at that wedding?

A There sure were.

Q Did your wife complain about it to you?

A I am afraid she did, yes.

Q All right. Now—

A It turned out to be a little more of a wedding between [163] agencies than between the bride and groom. It became a political bash, and this was not taken too well.

Q Now, Mr. Wilson, the Government has put into evidence Government exhibit number 3, which is the bill of the Easton Motor Lodge for the wedding. Now, if you will look at that exhibit, Mr. Wilson, you will note that there is an entry of one thousand dollars having been paid. Does it reflect by whom it was paid?

A Check by William Burke.

Q Does it reflect when it was paid?

A June 20th, 1966.

Q And that was before the wedding or that was before your daughter got married?

A Yes.

Q Now, were you aware that Mr. Burke had paid this?

A Yes.

Q Now, after the wedding did there come a bill, did you ever see a bill addressed to you from the hotel for the balance?

A I did not.

Q Now, you were visiting or you were still going to the Hotel Easton. Did at any time Mr. Dalrymple complain to you about the balance of the bill being owed?

A No, sir.

[164] Q Now, did you have any conversation with anyone concerning the bill, with either Mr. Brinker or anyone else?

A Yes.

Q About when was that, sir?

A Frankly, I don't know how the subject came up, but I do recall Brinker telling me it was paid. Burke told him that it was paid, and I just—I forgot it. I assumed that Burke paid it the same way he—

Q O.K. Now, about when, or when was that that Mr. Brinker told you that Burke said the bill was paid?

A That was in the winter. I guess it was the Christmastime, in that general area, Christmas, Thanksgiving.

Q Is that the first that you knew it was paid?

A Yes.

Q Now, let me show you what has been marked Government exhibit number 1, a check to the Easton Motor Hotel in the sum of two thousand and twenty four dollars and nine cents, and I am asking you, Mr. Wilson, under oath, did you order anybody to make that check?

A I centainly did not.

Q Did you ask anybody to make that check?

A I certainly did not.

Q Did you authorize anybody to make that check?

[165] A I certainly did not.

Q Did you direct anybody to make that check?

A I certainly did not.

Q Did you have the authority to authorize anybody to make that check?

A I have no such authority whatsoever.

Q Did you authorize anyone to approve that voucher?

A I have no such authority, no.

Q When, did you find out about the existence of this check?

A Of this check?

Q Strike that. When, sir, did you first find out that the balance of the money due the Easton Motor Hotel was paid purportedly or allegedly out of union funds?

A Recently.

Q How recently, sir?

A Please forgive me, weeks ago.

Q Well, how did it happen?

A I read it in the paper. I picked up the paper one morning and it said ex-union agent indicted for embezzlement, and I read about my daughter's wedding.

Q Were you ever notified by anyone from the FBI the twelve hundred and thirty three and fifteen cents was levelled against you?

A No.

[166] Q Mr. Wilson, throughout the three or four years that it took to get this thing all together, did you ever spend any of your own money?

A Yes, a lot of it, considerable money as compared to my income, yes.

Q Did you ever put in vouchers for that?

A No, the only thing I could put vouchers—I couldn't put any vouchers in. I would turn in a bill for organizing expense which came up on the floor, parking meter expense, and the expenses incurred in the performance of my duty.

Q Do you know, sir, how it happened that this bill was paid?

A No.

Q Do you know the circumstances and the events of how it came to be paid?

A No.

Q Do you know where Mr. Burke is?

A No.

Q To the best of your knowledge what was his last place of occupation? Where was he geographically?

A The state of Washington, Seattle, Washington, I believe.

Q Doing what, sir?

A Doing attorney business.

Q Did you ever submit the bill from the Hotel Easton to anyone who had the authority to pay it?

[167] A No, I never saw the bill. I never saw this bill.

MR. MILIDES: You may inquire.

THE COURT: Mr. Wilson, you have said several times you are married. When did you get married?

MR. WILSON: 1946.

THE COURT: That was after you came back from the service?

MR. WILSON: Yes, your Honor.

THE COURT: And you stated that you have four daughters and one son?

MR. WILSON: Five children, your Honor. Two grandchildren.
THE COURT: Their ages?
MR. WILSON: Twenty five, twenty one, twenty, seventeen, and thirteen.
THE COURT: Is that the boy?
MR. WILSON: The boy is seventeen, your Honor.
MR. MILIDES: If your Honor please, one other question.

BY MR. MILIDES:

Q Your twenty five year old daughter, she is married? This is the wedding we are talking about, isn't it?
A Yes, she is married.
Q I heard of the Harrisburg Seven, I am talking about the [168] celebrated two.
A She is married. She is married. I grant you, I guarantee it.
Q And she is married to a school teacher?
A Yes, she is.
Q What does your twenty one year old do?
A She is with Amtrack, the National Train System. She is a passenger representative on the trains.
Q What do your other daughter do, your younger daughter?
A The one who is twenty is a stewardess for Delta Airlines.
Q And your son, he works with you?
A My son is in school.
Q In school yet?
A Yes.
Q And your youngest daughter is how old?
A Fourteen.
Q And she is at home with your wife?
A Yes.
MR. MILIDES: Thank you, your Honor.
THE COURT: We will hold your cross examination for five minutes.
NOW, 11:45 A.M., Court recesses.
NOW, 11:50 A.M., Court resumes.
[169] THE COURT: Cross examination.

MR. MULLOY: Your Honor, counsel for the defendant advises me he has a few more questions to ask.
THE COURT: All right.
GEORGE J. WILSON, JR., having been duly sworn, was further examined and testified as follows:

FURTHER DIRECT EXAMINATION

BY MR. MILIDES:

Q Mr. Wilson, you did resign from this union?
A Yes, I did.
Q Would you tell the jury why you resigned?
A I resigned because I had had it with Easton Arms and red tape and—
Q You continued, did you not, for a period of time afterwards?
A I tried to. I tried in my way to pull the thing back together, but the rental restrictions were so and the requirements of occupancy were such that it was a losing battle.
Q Would they permit you to—could your own members of your union rent an apartment in their own complex?
A No.
Q Why not?
A Because they made too much money.
[170] Q Tell us what the handicap, what the obstacles were, briefly, if you will?
A The Government established an income level in given areas. Chicago was a lot higher than our area. I forget the figure, but the figure was it was such that if an apprentice electrician was making, I think it's,—I'm not sure. None of our electricians, even our apprentices, could afford to move into an apartment in which the rentals were like one hundred and forty dollars a month for the low.
Q They were making too much money or not enough?
A They were making too much.
Q And were there restrictions as to the number of people who could occupy a particular apartment?
A Oh, yes. You had to have so many rooms for so many people.

Q Did you try to get these restrictions relaxed? Did you present the problem?

A Yes, I did.

Q On how many occasions?

A I would say I presented it in depth on quite a few occasions, quite a few occasions. I don't know, I can't say in number, but I did try until I realized it was in vain and there was no sense in trying any further. The rentals were, the people that were in the income limits weren't making enough to pay the rent, and the people that could pay the rent were making too [171] much money, and the people in between had too many kids, and it was frustrating. We didn't know which was the way to go. So, consequently, when I spoke with, when I spoke in general to the FHA, I do recall a statement made by some one in the FHA that I came on strong and said, "Well, look, we have to rent these, we have a mortgage to pay, and we are just going to rent them." They said, "Well, then you're in trouble." I said, "We're in trouble anyhow," and they said "Well, we're not policemen." So I figured what could I do? If I would just rent it to people that could afford it, the place today would be gorgeously successful. I mean within reason. We would try to keep people that really needed it in there, if they could pay the rent. We had to pay the mortgage.

Q After resigning from the union did you get a job, sir, while you were still with Easton Arms?

A I was getting one hundred a week from Easton Arms as project manager after I resigned from the union, and I took another job with a newspaper in Allentown, Pennsylvania to supplement the income.

Q What kind of job was that, sir? What were you doing?

A Administrative work for the newspaper.

Q The name of the newspaper?

A The Labor Herald.

Q And you presently, what are you doing now, sir? [172] A I'm in the construction business, home remodeling and building homes. I am also in a furniture reclamation business as such.

Q What kind of business might that be?

A Stripping and refinishring furniture and setting people up.

MR. MILIDES: Thank you.

CROSS EXAMINATION

BY MR. MULLOY:

Q On those last several questions, Mr. Wilson, the money actually wasn't provided by the federal Government, was it?

A The money was provided—no.

Q It was provided by Bryn Mawr Trust Company, was it not?

A That's correct.

Q And the federal Government merely insured, the federal Housing Administration merely insured the loan to Bryn Mawr Trust Company?

A That's correct.

Q And I guess the unique thing about it was the one hundred percent financing?

A That's correct.

Q Now, this 221 D3 Program under which this financing was arranged is a program for low income housing, is it not?

A Low to moderate income.

[173] Q And there are certain federal guidelines as to what low to moderate is, is there not?

A That's correct.

Q Your electrical workers make a pretty good income, don't they?

A That's correct. They make a pretty good income.

Q They are a highly paid craft?

A Yes, they make a pretty good income.

Q So that they aren't low income people?

A They are not low income people they are highly skilled workers.

Q Highly skilled workers?

A Who make a wage commensurate with their ability.

Q So that they are not low income people?

A No.

Q Nor are many of them moderate income?

A They make more than laborers. No, I wouldn't say they were moderate. Yes, I would say they are moderate. They are not in the top echelon as you break down the wage structures.

Q The Federal Government's plan wasn't to make low rent housing available to people who are making a living or better than living wage, was it?

A Low to moderate income people were to be provided with [174] housing through this program, low through moderate.

Q And what was moderate, what did they tell you moderate was?

A Middle income.

Q In terms of dollars?

A Well, again, this was different in many parts of the country. In Chicago it was high. The high level there was eleven thousand dollars a year. I believe in our area it was nine thousand dollars. That is the high, but now you had to have—

Q In other words, anybody below nine thousand dollars a year could live in those apartments?

A If they had so many children. You see, the children also decided, the dependents decided. There were two factors. How much you made and how many children you had.

THE COURT: And not too many children?

MR. WILSON: You couldn't have over, the largest apartment would only take whatever the regulations provided. We didn't have any over three bedrooms.

THE COURT: You don't remember what that was?

MR. WILSON: I believe seven, your Honor, was the total number of persons allowed in the largest apartment.

[175] BY MR. MULLOY:

Q And this was in 1966 that that nine thousand dollars income top was established?

A I do believe it was nine with seven individuals.

Q And that was the income level established for the Easton area?

A Yes.

Q Would you agree that the difference between the Chicago and the Easton area is because Chicago is a much higher cost area for living?

A No, I wouldn't agree. I disagree. A loaf of bread in Chicago cost the same as it does in Easton.

Q Are you sure of that?

A Nope. Are you sure that it isn't?

Q You're the one who is testifying.

A You are quite correct, and I apologize, but I do believe the income levels were unfair. I do believe Easton deserved a higher bracket.

Q Mr. Wilson, you were an elected official, were you not?

A That's correct.

Q Hoy many times were you re-elected?

A I don't rightfuly know, except the first time I was elected I was elected for one year.

[176] THE COURT: That was when?

MR. WILSON: That was in the 1950's, your Honor, I think '56, '57.

THE COURT: That was your first election?

MR. WILSON: Yes.

THE COURT: You went in in '45 only as a member of the union?

MR. WILSON: That's correct.

THE COURT: You were elected, you believe, in 1956 to your job as business manager and financial secretary?

MR. WILSON: Yes, your Honor. Then prior to my first election all business agents, business managers, all officers were elected for one year. Now, under the Constitution we have the right, if the local union should so decide, that we could extend the term up to four years.

BY MR. MULLOY:

Q Do you recall what the terms were?

A The first term when I was elected was for a period of one year. The second term, I believe was for another one year, and we saw the conflict that could develop, and the minute you are in, you are campaigning for your next election, and you didn't get a chance to really get any solid program off. You could understand that, I'm sure. Now,

what we did, we [177] broadened the term for four years, and then I was elected to a four year term, and then the Taft-Hartley Act shortened the term to three years. So how many times I was elected in the ten year period, I don't know because the terms—that I was an elected official in that capacity and never in any other capacity. I was elected business manager and I served ten years.

BY MR. MULLOY:

Q In order to be re-elected you have to produce, don't you?

A Yes.

Q By produce I mean—

A You have to do the job.

Q You have to keep the men employed, you have to keep a good wage rate, keep the men happy?

A And the contractors.

Q Because there is somebody else standing in the wings waiting to take your place, is there not?

A Yes.

Q And, in fact, the business manager's position is a very important position?

A The business manager position is an important position, yes, to the function of the local.

[178] Q You were compensated in that position by the union, were you not?

A Yes.

Q During the time you were business manager you did not work as an electrician at all, your full compensation was as business manager?

A Right.

Q And I think you said you were paid the rate of the general foreman?

A I think I was.

Q I don't have the constitution in effect at the time, the current constitution or the current by-laws sets a rate at a weekly salary equal to one hundred and twenty five percent of the straight time or rate for the top general foreman?

MR. MILIDES: If your Honor pleases, if I understand Mr. Mulloy, he is questioning from the present constitution, and I think what is germane and relevant is the constitution extant in 1966.

THE COURT: You are making an objection?

MR. MILIDES: Yes.

THE COURT: The objection is sustained.

MR. MULLOY: Your Honor, I hadn't finished my question. I was going to ask if the by-laws had been changed in that respect since 1966.

[179] THE COURT: Would you like to rephrase your question, Mr. Mulloy?

BY MR. MULLOY:

Q Mr. Wilson, has Article VII of local 367 by-laws, which Article sets forth the salaries of individuals, including the business manager, been changed since 1966?

A The only intelligent way I can answer that is from the information you just gave me of the figure that I am totally unfamiliar, a percent, one hundred and twenty-five percent of the base rate. I know nothing of this. I left in '66, and things do happen, wiges go up and wage structures of the officers, I have had no contact whatsoever with the union since I have left. Now, what the rates are today, I don't know. I am in a totally unrelated business. My rate, as I recall, was one dollar over the journeymen's scale, or equal to a general foremen's scale. The general foremen's scale was one dollar over the scale. The scale was four dollars and seventy five cents. I was getting, I believe, five dollars and seventy five cents an hour, and it went up each time we negotiated a wage increase, the general foremen, of course, the journeymen, got an increase. Well, then the business manager's salary was geared to—we didn't negotiate a business manager's salary. It was due to the general foremen's salary.

[180] Q It was always geared to the general foremen's salary, but you disagree with the percentage, I take it?

A I know nothing about the percentage.

Q I see. Now, I think you testified with regard to the people in the office and you characterized Mr. Brinker as the office manager?

A That's correct.

Q Were you here yesterday when Mr. Thompson testified?

A Sure, yes, I was.

Q And he testified, I believe, well would you agree with his testimony to the effect that you were really in charge of the office and Brinker and Shaffer worked under you?

MR. MILIDES: If your Honor please, I object. Objection. May I specifically object? What Mr. Brinker, excuse me, what Mr. Thompson said on the stand is for the jury, and I think this is improper cross examination.

THE COURT: I think you should rephrase your question, Mr. Mulloy.

BY MR. MULLOY:

Q All right. Mr. Shaffer and Mr. Brinker worked in the office, did they not?

A Yes.

Q In working in that office, for instance, Mr. Shaffer was the president, wasn't he?

[181] A Yes, yes.

Q Was that a part of the duties of the president to work in the office?

A Yes, after I appointed him my assistant, which was a constitutional prerogative.

Q You had the constitutional prerogative to appoint an assistant?

A Yes, look under financial secretary in the constitution and it clearly outlines my responsibilities. I had the privilege and the responsibility to delegate authority and the responsibility to assistants who then again had the responsibility and the authority. If they did something wrong, I was the one that would get the heat from the membership, and I had the power to fire them, fire and hire. They were not elected, but they were responsible and the constitution states this. I had the right to appoint assistants or hire assistants, but they were responsible to me, and I told them, this is what you do.

Q And you also had the right to discharge those assistants did you not?

A Absolutely.

Q And those assistants could have been anybody in the entire membership?

A Yes, they could have been if I—but that would have [182] been a poor political move because you take the guys who are thought of the most by the membership and, as they are qualified, the president and the treasurer were the men. The treasurer, if he were out on a construction job, we would have to send some one running after him to sign checks.

Q It is true with both of these positions, is it not, that you appointed both Mr. Shaffer and Mr. Brinker to work in the office?

A They were not elected to the office job. They were appointed by me.

Q And you thought it wise to appoint the people who were the president and the treasurer respectively, but this wasn't necessary as far as the constitution?

A I thought it wise to do this. I needed assistance, obviously, with the money we were taking in, the mail, and so forth. I was never in the office for the most part, and I needed some one competent, and these two gentlemen were extremly competent.

Q And you also hired Mrs. Sippel, did you not?

A That's correct, these gentlemen were competent in business matters that didn't require specialized skill such as shorthand and typing.

Q Now, getting to the Easton Arms project, I believe you testified that you presented this to your executive board, [183] is that correct?

A Yes.

Q This was a project that you had envisioned from the start?

A Yes.

Q A project you had a great deal of interest in and then we say you pushed it right from the beginning to the end?

A Yes.

Q Were you a member of the executive board by virtue of being the financial secretary of the union?

A I had no vote in any union matters whatsoever.

Q I know that the business manager has none, I was just curious in your local they combine the two positions, business manager and financial secretary?

A That would be a little subterfuge there. If you combine the positions, you can't give the vote to one guy and not to the other guy. I was both guys and I had no vote.

Q You were also the one that located William Burke and encouraged his hiring by Easton Arms, Inc., are you not?

A Yes.

Q I think you said that you did not have the power to hire him, that the executive board of the Easton Arms, Inc., had to hire him?

A That's correct.

[184] Q Or did you retain him?

A No, there's no constitutional—I had to operate under the constitution and I couldn't hire anybody except those that were allowed to be hired.

Q I am talking about Easton Arms. Was Mr. Burke attorney for the union at the time?

A He was attorney for Easton Arms, but Easton Arms was, in effect, one and the same.

Q Was the same as the union?

A Yes.

Q How about Miss Hunt?

A Well, again, Mr. Burke needed a secretary because there was an awful lot of work there, and he was no typist either and there was piles of stuff that had to be done.

Q So Easton Arms hired Miss Hunt?

A Well, actually Mr. Burke hired her. We paid her. We did not say, "Miss Hunt, you will work here." Mr. Burke said I need a secretary, and we said—

Q She had various titles with Easton Arms though, not just secretary to Mr. Burke, didn't she?

A I don't think she had various titles, not that I—there was no titles provided for. The incorporators, there were five men who incorporated Easton Arms and they were titled [185] as incorporators. They were the

board of directors. We had a purpose clause and we were listed as non-profit.

Q It was a pretty loose organization at any rate. Did she not when she was secretary, did she not have other duties and other titles?

MR. MILIDES: If your Honor please, I am going to object to counsel saying that this was a pretty loose organization.

THE COURT: Rephrase your question please.

BY MR. MULLOY:

Q Did she not have other duties such as manager or office manager?

A She might have called herself anything for purposes unbeknown to me, but she had no title as such. She could call herself—

Q She was paid just for being a secretary?

A She had no authority under any assumed title. I don't know, she could have been typist one day, she could have been shorthand expert the next, I don't know.

Q Who had the authority?

A Of what?

Q To act on behalf of Easton Arms?

A The five people on the board.

[186] Q Did the five people on the board, did they involve themselves in the day to day functions of Easton Arms?

A No, but they involved themselves on a monthly basis. You see, each time there was a union meeting there was a meeting of Easton Arms either prior to or directly after the union meeting so that we wouldn't have to gather the fellows, and we had other meetings that priorities demanded during the daytime. We had some luncheon meetings, some dinner meetings. It would depend on the magnitude.

Q Are you familiar with the general corporate structure, that is, there is a board of directors, and then there is a president who reports to the board of directors?

A No, no, I am not familiar with them.

Q With regard to Easton Arms then would it be fair to say that the executive board set policy and that you,

or some one else, was charged with the responsibility of carrying out the functions of Easton Arms in accordance with that policy?

A They gave no right to anybody other than the officers that changed hats. If they were officers, I was business manager of the local, I just assumed business manager of Easton Arms. Now, for that particular document, if there had to be a corporate structure as such, then I was chairman of the board or something, but still in all we have the [187] local union were one and the same, the officers went from here over to here and they were guided directly by the internal affairs of the union.

Q I understand that, but you were in charge of the day to day operations of Easton Arms, were you not?

A More so than anyone else.

Q Yes, because every decision that had to be made couldn't be referred to this board of officers, could it?

A Every major decision that was made certainly was referred to the board.

Q But the day to day operations?

A The day to day operations involved me going out and creating things that required decisions. We had to get this show on the road. I didn't know where I was going from one day to the next. When something came up, I couldn't make a decision and I would either get these problems together and take it before the board or call a special meeting or—

Q You did a great deal of work for Easton Arms. You testified you went to Washington, you went to Philadelphia, you went to Newark?

A Yes, I did, I did an awful lot of work.

Q And you went with the authority of that board, did you not?

[188] A In certain cases, if we knew exactly what was going to come up, if a decision had to be made, we would discuss this and then I would have the authority to either say yes or no or both or neither, but, all in all, I didn't make—my income was from the local union and I had to—I mean, Easton Arms was a spin-off of the local, and for me to go out and—I lost

my job as a result of it because of my own volition, but this whole thing caused me to throw away a lifetime job that I worked hard to get, and I wasn't going to make decisions that I thought would cause controversy. I did what I thought was right.

Q You stayed with Easton Arms after you left the union?

A For a short period of time.

Q Do you remember how long?

A A few months, I don't know.

Q And at that time Easton Arms was being occupied, was it not?

A Well, it was occupied, it was and it wasn't. There was a tremendous amount of trouble.

Q Getting to—

THE COURT: Mr. Mulloy, may I see you and counsel for the defense?

MR. MULLOY: Certainly.

(Unreported sidebar conference follows.)

[189] THE COURT: Ladies and gentlemen of the jury, I would let you go to lunch now, and I would caution you that you have only heard a part of this case, that you are not to make up your mind about any phase of it while you are away from this courtroom, and you get a little bit of a break at this time because my deputy clerk has just advised me that we have another matter at two o'clock which I will have to take care of, but we will take our lunch recess now, and I caution you again, don't talk about the case either among yourselves or with anyone else and, should anyone attempt to talk to you about this case, I would want that fact reported to me immediately upon your return.

You may go to lunch and be back in your seats at two thirty.

NOW, 12:29 P.M., Court recesses.

NOW, 3:03 P.M., Court resumes.

THE COURT: Is there anything counsel wishes to take up with me at this time? May I see you for a moment?

(Unreported sidebar conference follows.)

THE COURT: Mr. Wilson, will you take the stand? We are now ready to go ahead.

[190] GEORGE J. WILSON, JR., having been duly sworn, was examined and testified further as follows:

FURTHER CROSS EXAMINATION

BY MR. MULLOY:

Q Mr. Wilson, with regard to this wedding reception that was your daughter's wedding reception we have been talking about throughout this trial, was it not?

A Yes, it was.

Q How many people attended that reception?

A I really don't know, except what I have seen here, apparently three hundred and twenty one dinners were served, and I would assume that is how many people attended.

Q You say you would assume, would that be somewhat in accordance with your recollection? In the neighborhood of three hundred people, at any rate?

A My recollection is determined by the—yes, I would say that is—

Q I think you said on direct that among the invited guests were members of the local 367?

A That's correct.

Q Do you remember how many of those poeple or how many members of local 367 came to the reception?

A Perhaps—no, I don't remember just how many, but [191] there was, there were all of the officers, as such, were invited, and anybody that expressed a desire, I suppose, or showed—we had various committees in the local appointed by the local president, to wit, the apprentice training committee which played a significant part in the function of the local, the auditing committee, various committees. Anybody who was in a responsible position in the local who could answer any questions, anything, if some one were there, and how are you doing, they were—let me say this, as I recall, people were told to politic, O.K.?

Q It wasn't the entire membership then at that time?

A Oh, no, no, sir.

Q Would you say that there were one hundred people from the union invited?

A No.

Q Two hundred people?

A No, I would say there would have been less than one hundred.

Q How many people—

A This was their wives too, you understand. If a member came, he brought his wife.

Q So that if you say there were less than one hundred, that means really less than two hundred of those attending came from the union itself?

[192] A Well, let me put it this way. This is what I am trying to say. If we had fifty members of the local, then we had, it's fair to say, I think that one hundred—

Q One hundred guests?

A One hundred guests.

Q I am glad you clarified that.

THE COURT: There were a great many guests that you hoped to influence as to this low to moderate housing situation?

MR. WILSON: Yes, your Honor.

BY MR. MULLOY:

Q Now, I think you said there were councilmen there and was the Mayor there?

A Yes.

Q Was anybody there from FHA?

A I don't really recall. I honestly don't. There could very well have been but I can't specifically state that there were different levels of FHA there. I don't know.

THE COURT: Was your attorney, Mr. Burke there?

MR. WILSON: Oh, yes.

BY MR. MULLOY:

Q Was Miss Hunt there?

A Yes.

Q Do you recall how many people you could put in the [193] category, let's say, councilmen and redevelopment authority people that might have come?

A As I recall, Mr. Burke invited some people, which was quite all right with me. If a local officer decided that he knew some one who should have been there, he, of course, invited him. I was mostly concerned with my immediate family in this particular case. I am being frank when I say I wasn't, I was paying more attention to my daughter on that particular day.

Q This reception was this, Mr. Burke's, yourself, or your daughter's, I mean?

A It was my daughter's reception.

Q Did you issue invitations in the normal course to a wedding reception?

A I think my daughter did and she invited like the people she wanted and my family wanted and his family wanted, but the other invitations were not formalized because I think there's an R.S.V.P. type of thing, and there was nothing firmed up. It was a flexible thing, and that's why I don't know exactly how many were there. Some came in and probably some left. I am not being facetious. I am being serious about this, but the people that were there for the purpose of being influenced politically and for good will, I didn't expect any gifts or anything as such, and, of course, they [194] didn't, but the immediate family did. I think you are familiar with wedding procedures, a line was formed, and thusly, but the family was—it was like a two-fold type of thing, as I recall.

Q Now, you say you discussed the reception prior to the actual having of the reception with Mr. Burke. Did you discuss it with any of the officers of the union?

A Yes.

Q It is your testimony you discussed who would attend the reception or some of the people who might attend the reception with them?

A As I recall, there were no names mentioned because this was being presumptuous on our part that they would come. It was generally stated, I believe, that we should invite as many politicians as we could invite or anybody that would in any way at all get to help our cause. I think this would be a good vehicle for assistance.

Q Did you discuss at the time with the union officers or with Mr. Burke who would pay for this wedding reception?

A Well, no, not at that particular time, but I was assuming that I was going to pay for it. There is no question about that.

Q You are so assuming you were going to pay for it?

A This was my assumption at the time, yes.

[195] Q And when did that assumption change?

A Well, Mr. Burke, Mr. Burke made the payment as a request to the—I forget where I was at the time, but that has since been repaid, Mr. Burke gave the thousand dollars to the Hotel to secure the room for that particular date, and that was a loan to me from Mr. Burke. I had intended to pay the Hotel bill. I was being dunned for it. Mr. Delrymple never asked me for it and, frankly, I was happy that I was not being dunned for it at the time, and then, when I found out through Mr. Brinker, he said Burke told him it was paid, I—

Q Where did you live at that time?

A In Easton, Pennsylvania.

Q What address?

A 4615 Charles Street. I have lived there since 1956, I guess.

Q Who made the arrangements to the Hotel for this reception?

A Well, there were no in depth arrangements. I mean, there was just a request for the room for a particular day and an O.K. that it was open, and the room was capable of handling so many people. Now, I think the room could have handled easily five, perhaps six hundred people easily, and there were no formal arrangements, as I recall. I didn't get into [196] any formal arrangements, no floral displays—

Q Well, were there floral displays?

A I say I didn't get into any of that, I don't know.

Q Well, were there floral displays?

A I don't know. I didn't get into any of the arrangements. I see on this bill that there was a charge for greens. I imagine there were flowers at tables.

Q I am not asking—I think you are saying I don't know who made the arrangements. You were there at the reception, weren't you?

A Yes.

Q Were there flowers there?

A There were flowers on the tables, I imagine. I would say from seeing this bill, yes, but I don't recall seeing any flowers.

Q Do you know who arranged for how many bartenders would be there?

A The hotel.

Q Did you tell them how many people to expect?

A As I recall, I said, "We are going to have a wedding, we are going to have a lot of people, and I want the big room."

Q And that was the extent of the arrangements?

A I have known Mr. Dalrymple all of my adult life and, with the frequency that I was in and out of the hotel, it [197] wasn't a thing I was concerned about. He was very cooperative to the extent that if this thing got out of proportion he could pick up the phone and have as many waitresses and bartenders as needed.

Q Is he the one with whom you made the arrangements?

A He was in charge of the hotel at the time.

Q Yes, I know that, but is he the one with whom you made the reception arrangements?

A I don't recall. I really don't recall.

Q You just said Mr. Dalrymple could pick up the phone and call?

A He could. He was in charge of the hotel.

Q Is he the one you were telling me you discussed these arrangements with?

A I don't recall who I discussed it with. It could have been with him or the desk clerk.

Q Was there a Mr. Meyers there at the time?

A Yes, there was, I believe.

Q Could you have discussed it with him, do you think?

A I might have. I honestly don't recall that far back.

Q Did you tell anybody what the anticipated number of guests would be?

A No, we didn't. We really didn't know.

Q What you are telling me then and the jury is that you [198] went to the hotel and you said we need the big room we are going to have a wedding reception, and that is as much information as you gave them?

A That's about the size of it.

Q And it turned out that there appeared magically, or by whatever means, maybe your wife ordered it, I don't know, a wedding cake, there was a wedding cake there, wasn't there?

A I think that my daughter and my wife, of course, took care of the wedding cake and the other things that women think of and that I don't know about, but appreciate, but I can't even recall. I don't even remember the cake. I am sure there was a cake. I don't remember, I don't know where it came from. I really don't. I don't know who baked it or what size it was, or how much it cost or anything. There were two families involved here. The women were doing very well and I was perfectly happy to leave it that way. I don't do a woman's job.

Q I assume they served liquor at the wedding?

A Your assumption is correct.

Q And who ordered the liquor?

A The liquor was ordered with the wedding, as I recall. It was included in so much—I bought out of my pocket champagne to keep the expense down and I brought it in in case lots from the liquor store because in the hotel they [199] charged, I think, a little high for a bottle of champagne.

Q Are they the bottles for which there was a corkage charge?

A Yes, but they still charged, as I see on the bill, two dollars and fifty cents corkage to bring it in, but we still I feel, saved money in doing this, and there was a glass each, as I recall, for a toast, and this possibly could have been suggested by my friend, Melvin Dalrymple, as we were kids together. He probably told me that this was a way to, something motivated me to buy the champagne and bring it in rather than buy it at the hotel, and I think I was told, "Why don't you get it yourself and bring it in and pay corkage?"

Q How did you estimate how much champagne to bring in?

A I don't know. I assure you that if we needed more we could have gotten it because the liquor store is right across the street from the hotel. As a matter of fact, the hotel could have supplied whatever more was necessary, if it were necessary. They did supply martinis and manhattans which were premixed, and all hotels carry, I think all hotels carry a supply of liquor where they can premix quickly five gallons of manhattans or martini drinks.

Q Do you recall that that is what you did have there? [200] A I recall because I saw it on the bill. There was also a bar that people spent money at downstairs from the room which they went. They retired to even during and after and before the reception.

Q You say Mr. Dalrymple was your friend, lifelong friend?

A Well, I have known Mr. Dalrymple since high school. There was a period of years and years and years that I never saw Mr. Dalrymple. I was five years, four years in service, I guess, four years and something. I never saw him in this service, but I saw him in high school. I got out of the service, got married, moved to Philadelphia and got married, and then moved down here, lived down here, moved back to Easton in 1950 something, but the—

Q You consider him a friend, though, don't you?

A I would consider him a person I have known for a long time and I would say yes, there has never been any unfriendly relation between he and I.

Q How about Mr. Thompson, do you consider him a friend?

A I have known Fred Thompson ever since I have been in the union.

Q And, Mrs. Sippel, she is a friend too, is she not?

A Well, Mrs. Sippel, now I didn't know, I still don't know Mrs. Sippel. I don't know, I can't tell you honestly to this day if Mrs. Sippel is married, if Mrs. Sippel has [201] any children, where Mrs. Sippel is living, how old she is, what religion she is. I do not know anything

about Mrs. Sippel except one thing, she can type very well and she is very good at office procedure because she worked for an attorney in the city of Easton and she came with high credentials. She was the legal secretary and I met her one day and, for reasons peculiar to her own life, there was a change, a physical change in the office, they were moving out of the redevelopment area into a new building, and she said something quickly to me like she wished, and I said, well we need a girl and we would be happy to talk to you, and that's the way she was hired.

Q You hired her?

A I hired her, but I also had to discuss it with the—when I am saying this, I am not saying—I had extreme powers. There were things that I could do and things that I couldn't do, but, being in the political situation that I was, I was an elected official and I tried to abide by it. I impressed it strongly upon the officers that this was the person who should be in the office and, frankly, there was no objection or opposition whatsoever.

Q At the time of the wedding reception, which was around the twentieth of June or thereabouts of 1966, how far along was the construction of Kennedy Gardens? [202] A Oh, to the best of my knowledge, perhaps on the final leg of completion.

Q Do you remember when it was first occupied?

A In the, I believe in the fall of 1966.

Q Would the late fall be more accurate?

A I don't know, I can't say.

Q At any rate, at the time of the reception your financing, you had the construction financing already?

A Oh, yes.

Q Your land aquisition?

A Yes.

Q And the making of the necessary arrangements for the federal authorities, they were all pretty well behind you, were they not?

A Yes.

Q And this was the purpose of many of the meetings you had had through the course of the Easton Arms, Inc. project?

A That particular project. We also had an additional seventy five units to Kennedy Gardens, phase two. We also had, we had an architect from Scranton, Ballante and Klaus, who came down. They drew plans for the property that we acquired in Phillipsburg. They might have been at the wedding talking to zoning officials or what not from New Jersey. We also had a nursing home contemplated where I have already [203] gotten the certificate of need and paid out of my pocket.

Q Mr. Wilson, one thing I am not quite sure of now. I am under the impression from your testimony and from some of the other testimonies I have heard that any time you wished or Mr. Burke wished to have a meeting to discuss any of the Easton Arms projects or any of the union projects there was no problem of arranging a luncheon or dinner at which time you wine and dine whoever it was you wished to talk to. Am I right?

A The only problem was getting the people there.

Q But whenever you wanted you could get as many people at a given place at a given time?

A For a given purpose, I would say yes. We didn't promiscuously go out and have parties. This got to be work you know.

Q I realize that.

A Late at night, I mean, that's not fun, you know, it isn't a fun thing.

Q Fine, but what I am saying is if, for example, the architect from Scranton wished to talk to the zoning officials about curbing or what have you, whatever you just testified to, was no problem with regard to setting up a meeting, a luncheon meeting, a dinner meeting, at which time the union picked up the expense and you could discuss these things?

[204] A At which time the union picked up the expenses. On many occasions, on more than one occasion the union didn't pay anything. If the architects were coming up with preliminary drawings, this is part of their, this is part of their way of being active in the thing, not trying to impress anyone. It is a business expense to them. If they were to come in and say, "We

have got some plans," they are trying to sell this to us who, we, in turn, had to turn around and try to sell ourselves to the FHA and our own group of officials and politicians. If they came in, it was highly likely that in many a case that the architects would pick up a luncheon bill at any cost. We were committed and we couldn't just walk out without paying, but I would say we weren't always the first to grab the check.

Q What I am getting at is, I think you testified on direct that there were numerous meetings, luncheon meetings, for which the union paid, the Circlon Restaurant, I think a meeting at the Scandinavian Inn has been mentioned, other meetings at the Easton Motor Hotel has been mentioned, all of which were paid for by the union, and these were meetings set up, as I understand it, to present your plans to various public officials, the mayor attended these things, Congressman Rooney attended these things, there were numerous meetings of this type, weren't there?

[205] A Yes.

Q So anytime you wished to have a meeting to attempt to do, I'll say, a salesman type job on these people, you could have the meeting and there was no problem with regard to having the union pick up the expenses? Am I correct in that assumption?

A Yes.

Q Now, in the period of June, 1966 to November, 1966 you were the financial secretary of the union, were you not?

A Yes.

Q And, as such, your responsibility was to collect the dues from the members and the assessments or see to it that they were collected?

A I think I outlined specifically, almost on a verbatim basis, what my duties were as financial secretary.

THE COURT: You are dropping your voice, Mr. Wilson.

MR. WILSON: What my authority was and what my responsibility was. I was well schooled by the international office as to what we could do under the law, what we could do under the constitution. I appointed

an assistant and he carried out the duties of the financial secretary. For your information the reason the two offices were combined was simply that if a local union could not [206] afford to have a full time business manager, they would then have a part time business manager who, perhaps, was on the road looking after his local union maybe two half days a week, and this caused problems with the contractor he was working for, but this was the way it was before unions in the building trades, that I am proud to be part of, became of age and realized what we could do if we got involved in community efforts. Now, the financial secretary then was combined with the business manager because a financial secretary would be elected and a business manager would be elected, but where the office was combined they gave me the right to appoint a financial secretary and I did. I didn't collect any dues.

BY MR. MULLOY:

Q I understand that, but, as the elected financial secretary of the union, if you will bear with me for just a minute, the ultimate responsibility for seeing the dues and assessments were collected was yours. You have testified that you hired an assistant, you had an assistant do this for you, but under the constitution the ultimate responsibility was yours, was it not?

A The responsibility was mine, but, if he did something wrong, the responsibility was for me—

[207] Q To remove him?

A I wasn't guilty because of something he did.

Q Now, but the responsibility was yours and, if there was any difficulty in collecting dues and assessments, he would come to you and tell you there were problems, would he not?

A No, not really.

Q In other words, if the membership refused to pay his dues for a period of three months, he wouldn't come to you?

A No way.

Q You mean your assistant wouldn't tell you that?

A The assistant wouldn't bother me with such a trivial matter because this never happened.

Q All I am attempting to ask—

A We never had any delinquencies in our local union.

Q All I am attempting to ask is so long as the assistant was doing his job and everything was going along the way it should, all you had ot do was understand from him that everything was all right, but, if something went wrong, whether it is his fault or not, just say for whatever reason, so it never happened, but for whatever reason, this is just an example I will pick out, the men refused to pay their dues, let's say five hundred of the membership refused to pay their dues, wouldn't that man come to you because it is your ultimate responsibility to see that they [208] are collected?

A If you can establish such a hypothetical situation, I can go along with you.

Q Now, the reason I ask that is that you would have knowledge through the people who reported to you or who were responsible to you whether or not there was a shortage in the union bank account, whether or not the funds were low, not that they were missing for some reason, but whether or not the funds were low, would you not?

A Each month, each and every month, the auditing committee met and went over all of the bank deposits, all of the union receipts, and all of the assessment income, and they went over the deposit slips, they made out a financial statement and sent a copy to the International after it was approved by the local union meeting, which had to be held under the constitution every month. So each month every member of the local knew exactly where the finances of the local stood, how we stood and if anything were amiss or necessary there it was, plus the fact that the federal Government requires that the financial statement be placed in a conspicuous spot, as such, on the wall of the local union. If anyone should come in, any member wanted to know where we are financially, they are entitled to see immediately a copy of the financial statement which shows expenditures, [209] income and expenditures for the preceding thirty days.

Q So then could you tell me from the period of June, 1966 to November, 1966 the union always had a comfortable bank balance?

A They are still in business.

Q And at any time during that period they could have paid a twelve hundred dollar bill and it wouldn't have broken or overdrawn the balance?

A I don't think our treasury was ever that low. As a matter of fact, no.

Q So that paying the bill during that period of time at any point during that period of time wouldn't have been a burden on the union or on the bank account?

A No, but again that wasn't my function. No one reported that to me.

Q No, I am not asking whether it was your function. I am just asking—

A No one said to me during that period, "Hey, we are low on funds, we can't pay these bills." That was never said.

Q So from that you would assume they had sufficient funds?

A I would have to assume that.

Q And you did see the financial statement from time to time?

A I didn't pay too much attention to it.

Q And it was your responsibility though to see the monthly [210] dues were collected and the assessments through your assistants, but it is your responsibility?

MR. MILIDES: If your Honor pleases, this is objected to, isn't this repetitious?

THE COURT: Quite repetitious, but I think we will let him answer it this one time. Can you answer the question?

MR. WILSON: Yes, your Honor.

THE COURT: Do you understand it?

MR. WILSON: Yes, I certainly do, but I appointed an assistant and, again, gave him the authority and the responsibility and, when he said nothing to me, I didn't go looking, let me see if that was correct. If he said it was correct, it was correct. The international, their auditing

committee, if our finances were something wrong, they would come in and stop us. I didn't get into it.

BY MR. MULLOY:

Q Now, one final question I have is at this wedding reception were there any architects there with plans of an apartment building or financing statements that you are aware of?

A Not that I am aware of. As a matter of fact, if any came I would ask them to retire to another room. You know, [211] that would be a little officious. I don't think I could in good conscience permit that type of activity at my daughter's wedding, but I did permit and suggested a lot of conversation.

MR. MULLOY: That's all I have.

REDIRECT EXAMINATION

BY MR. MILIDES:

Q Mr. Wilson, you had a little problem with the city of Easton just about this time with respect to off street parking and reneging on their part, is that correct?

A That's correct.

Q Tell the jury that particular problem that existed just prior to completion?

A The FHA required under their minimum property standards of buildirg many things which drove the price of the construction sky-high and reflected in the rents. It drove the mortgage up and so forth, but now, the initial plans was that the parking was to be in an area as normal parking would be, but then they threw a curve at us at the last minute that we had to have seventy five parking places off street. Well, the general design of the building that I was instrumental in, I was instrumental in changing the heating system from whatever the architect envisioned into an [212] electric heat job, we did feel we could maintain it a lot easier, we knew electricity, but, when this off street parking thing came in, the city had previously promised they would do anything to get this tax base on this vacant nine years land which was doing nothing so

they could all politically capitalize on it, that we push this in. They wanted to point with pride how the Redevelopment Authority was going to redevelop the whole south side of Easton and really did the Easton Arms group a real assist. We got some assistance. When it came time for the off street parking we didn't get, we didn't get, I don't know where the promised cooperation went—

Q Who had to pay for the off street parking?

A We did.

Q Was there a commitment on the part of the city fathers that they would supply the off street parking?

A They would only commit themselves to the fact "Don't worry about it," the handshake, the picture, and the press and then after that I didn't say anything, but there was never a letter of agreement that we will do this, we will do that, that type of thing, and we made a mistake.

MR. MILIDES: I have no further questions.

[213] RECROSS EXAMINATION

BY MR. MULLOY:

Q If I may, when did this off street parking problem arise?

A Towards the end of, I don't know whether it was towards the end of planning or towards the beginning of construction. It was a curve, it was something that—well, may I refer to another situation? Did I mention Doorbucks? Do you know what a Doorbuck is? A Doorbuck is the frame that goes around that door. That metal frame supports the door through the hinges and affords the area for the lock that makes the door possible to operate. That is called a doorbuck. In your home, most of you, you have got wooden doorbucks because they are nailed into the studding and to the rafters. Now, in masonry construction they are metal and they are more expensive than the average framed in doorbucks that you find in the average dwelling. We had planned from the FHA that, obviously, we got the money, we had the closing, you must understand Easton Arms didn't get any money here. This money was paid to the contractor who was doing the job and he had to submit mountains of reports each month as to how this money was paid out. No money touched our hands. The money that was allocated to the contractor went to the contractor on approval. It had to go through the architect. He got his fee from the bank. Nobody got anything. Easton Arms got nothing back. The legal and organizational fees were [214] paid to the attorneys. Don't get the idea that they came in and just put down a big bag of money and said go get them. We saw nothing. All we saw was bricks and mortar going up. Now, the plans were never approved because the FHA doesn't approve anything in the way of a plan. That sounds funny, but it's true. When I went back they said, "Well, these aren't approved." I said, "Well, I—, they said, "Well, we don't approve them", because nobody is going to put his approval on them. There is always somebody else to say well, that's wrong, and that's exactly what happened to us. We had seventy five doorbucks set in masonry and cinderblock, and they were set there solid ready to go on. This guy comes in. I was over on the job site, which was part of my function, and I enjoyed being there, we were creating something. This guy says, "They all have to come out." Well, this is a lot of money and I questioned who he was and what not and that is when he told me these plans are not approved. He said they have to be changed, and they did. We had to take all those doorbucks out and put bigger ones in. So he pointed it out and the minimum property standards, but, yet, when the architect designed the thing he used the minimum property standards and when he went to the FHA everything—I went down one day with an architect at the FHA office here in Philadelphia and I took the plans, these were preliminary [215] plans, and we were trying to convince him that a garden type versus this, and there were many different things, and he took the plans and he looked at them and he literally threw them right over his head, he said, "They're no good."

You know, that's no way to treat someone who has put so much effort into something, but this is precisely what happened. That is exactly what happened, and, because of these things, it was extremely frustrating. I'm sorry, I don't even know what the original question was.

Q No comment. O.K. One other question. Do you recall testifying at a pretrial hearing in this court last Tuesday under oath?

A Yes.

Q Do you recall my asking you whether you paid for any of the wedding expenses?

A I believe you did.

Q Do you recall what you answered?

A I don't know. I don't think I knew at the time.

Q That was your answer. Did you testify how you repaid Mr. Burke the one thousand dollars?

A Well, hey, I found out about this thing real quick, and then these questions coming at me, and when I think back, and I do mention these things to my wife—she is dying right now to hear me on the phone, to wonder what is going on here—

[216] Q Are you now saying you paid Mr. Burke back the one thousand dollars?

A Mr. Burke, the one thousand dollars that he, because of me not being there and so that he could secure the thing, yes, that has been paid back.

Q That has been paid back by you?

A By me to Mr. Burke, yes.

Q But you didn't recall this on Tuesday?

A No, I didn't even know Mr. Burke made a deposit.

MR. MULLOY: I have no further questions.

MR. MILIDES: That's all, Mr. Wilson.

THE COURT: Thank you, Mr. Wilson.

(Witness leaves stand.)

THE COURT: Any additional witnesses?

MR. MILIDES: Yes, if your Honor please. Mr. Joe Hargis.

JOE HARGIS, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MILIDES:

Q Your name, sir, is Joe Hargis?

A That's correct.

Q And your occupation is a member of the FBI?

[217] A That is correct, I am a special agent.

Q And are you the resident agent in Allentown, Pennsylvania?

A I am one of them.

Q And how many are there there?

A Ten or eleven at the present time.

Q And how long, sir, have you been a member of the Federal Bureau of Investigation?

A My total tenure is since 1955.

Q Now, sir, at one point in your career at some time did you receive a directive to make and undertake an investigation of the activities of Easton Arms?

A Yes, I did.

Q And when did you commence your investigation of the activities of Easton Arms, when did you start it?

A The first interviews were in June, 1968.

Q In June of 1968. Do you recall testifying at a preliminary hearing approximately two weeks ago.

A Yes, I do.

Q Do you recall being asked the very same question?

A Yes.

Q Do you recall what your answer was?

A June, 1968.

Q Sir, does the date September, 1966 mean anything to you with respect to this investigation?

[218] A September, 1966 was before this thing started, I mean before this check was written.

Q That's correct.

A No, I don't recall saying September, 1966.

Q Did you say some other date?

A I said June, 1968.
Q All right, and you completed your investigation when, sir?
A The total investigation was completed, I believe, sometime in 1970.
Q So that do you recall when in 1970?
A I think the last act of investigation I conducted before the indictment was in mid 1970, about July.
Q And then, sir, you called at the office of the union at the Drake Building in Easton and you talked to Mrs. Sippel?
A Yes.
Q And did you see the account sheet, the ledger sheet of monies advanced by the union to Easton Arms?
A Yes, I was given a copy of a columnar pad, I would say, with a list of checks which were supposedly expended by the union.
Q Now, sir, did you consider your investigation complete?
A No, no, I didn't.
[219] Q You say your investigation was not complete?
A No, I thought you said did I consider it complete at that time?
Q No, when you were done back in June of 1970 would you consider, sir, your investigation complete?
A Well, I don't know exactly how you would answer a question like that because I have conducted interviews as recently as last week.
Q Well, sir, you turned the information over in 1970, June of 1970, to the Justice Department, isn't that true?
A My reports continuously went to the Justice Department.
Q Yes, sir, but when did you turn, when did you first meet with the Justice Department after you started your investigation?
A Well, I first met before I started the investigation.
Q And then after you met again with them, did you not?

A Several times.
Q When was that, when was the last time you met with them?
A I am still meeting with them, I would suppose.
Q Well, this—
A I have continuously met with them since the beginning of this thing.
Q But you said, sir, at the preliminary hearing—
A Probably at least once every two months, maybe.
[220] Q Am I correct, sir, what you said at the other hearing that your investigation took approximately one year?
A The investigation of this particular aspect, collecting documents, took approximately one year.
Q And then you gave that information to the strike force of the Justice Department?
A I believe to both the United States attorney and to the strike force.
Q Tell us what the strike force is?
A It is my understanding it is set up to investigate organized crime.
Q Organized crime, OK, and you went through them, as a matter of fact, you saw the voucher for that one check, did you not? Mrs. Sippel said that—
A I saw a lot of papers over there. I am not absolutely positive I saw the exact voucher.
Q You are not?
A No, I am not.
Q Well, who served this subpoena duces tecum, bring with you documents, on Mrs. Sippel?
A No one said I had a copy of that document.
Q I am asking you, sir, did you serve a subpoena duces tecum to bring with you, for Mrs. Sippel to bring with her the voucher for that check, Government exhibit number one?
[221] A No, the subpoena I served on her did not call specifically in the subpoena for her to bring that particular thing. I did ask her to bring it.
Q Was Mrs. Sippel mistaken when she said that there was a voucher?

A Not that I know of.
Q Well, did you see a voucher?
A I do not recall seeing that specific voucher.
Q Didn't you think that was an important item of material, important in this kind of a case?
A I did ask her to bring the voucher with her to court.
Q Well, did you make a photo copy of the voucher?
A No, I didn't.
Q Now, the indictment in this case was submitted to the Grand Jury on October 28, 1971, right?
A That would be about the right date, yes.
Q Is there any question about that, Mr. Hargis, in your mind?
A No question in my mind.
Q So that is the right date, isn't it?
A As far as I know, if it says so.
Q And that was three days before—
MR. MULLOY: Your Honor, I am going to object. I don't think this is any part of the jury's consideration.
[222] This is a matter of law Mr. Milides is bringing up.
THE COURT: I think this is evidence.

BY MR. MILIDES:

Q And that was three days before the statute of limitations was going to run out, isn't that right?
A It would be three days before the five years, yes.
Q Yes. As a matter of fact, this was submitted to the Grand Jury the Thursday before the Monday, right, that the statute of limitations was to expire or run out, isn't that right?
A That would be about right.
Q And the strike force sat on your information for how long before the strike force submitted the information to the Grand Jury that sat in this building, sir?
A Sat on it? I don't know. As I said, my investigation was completed about the middle of 1970.
Q And how long did the strike force have it?
A Well, if you consider the investigation complete at that time, it would be about a year.

Q About a year?
A Slightly over a year, yes.
Q Now, as a matter of fact, Mr. Wilson was never notified that he was arrested, is not that true?
A Notified that he was arrested?
[223] Q Yes, that the Grand Jury returned an indictment against him to give him an opportunity to come up to Allentown, isn't that true, Mr. Hargis?
A I don't understand your question. Was he notified he was arrested?
THE COURT: If you don't understand the question, rephrase it please.

BY MR. MILIDES:

Q I will rephrase the question. Did someone from your Bureau notify Mr. Wilson that the Grand Jury sitting three days before the statute of limitations was to run that he was under arrest, that a bench warrant had issued?
A Yes, I notified him on the following day, I think it was.
Q Isn't it a fact, Mr. Hargis, that I called you, someone in your office and said that Mr. Wilson had read in the newspaper that he was indicted and bail had been set at five hundred dollars by Judge Lord?
A I was approximately two blocks from his home the following morning after the indictment when I received a radio call to call you. I pulled into a phone and called you and you told me that, yes.
Q And the Morning Call that had been put out, the paper of general circulation in our area, carried the story before the defendant, himself, was notified, isn't that correct?
[224] A That's probably right, yes.
Q Now, you are the prosecutor in this case, is that it?
A No, I am not.
Q What is your official designation?
A I am merely an investigator.
Q You are the investigator, and you were the, I believe you testified, at the preliminary, excuse me, at the

other hearing some two weeks ago that you were the only person involved in the investigation?

A No, I didn't.

Q This aspect of it?

A This aspect in the Allentown-Easton area.

Q O.K. Now, was this defendant even ever afforded a preliminary hearing, taken to a U.S. Commissioner?

MR. MULLOY: Your Honor, this again is a matter of law, whether or not he was entitled to a preliminary hearing was a subject of a motion made to this Court.

THE COURT: I know, but it could only be based on testimony to which this man would have to testify to and after that it becomes a matter of law, but certainly he had a right to question him on cross examination.

MR. MULLOY: He has a right to question him, but the issue with regard to a preliminary hearing, as I pointed out, is a matter—under Federal rules and Federal statutes [225] there is no right to a preliminary hearing. So whether he had a preliminary hearing or not doesn't matter.

THE COURT: I think that is true and you should phrase your questions along that line.

BY MR. MILIDES:

Q O.K. Just one other question. There is another special Grand Jury probe going on now, is there not, for the activities of the FHA? Do you understand my question Mr. Hargis?

A I don't know what is going on before the Federal Grand Jury. That is secret testimony, as far as I know.

Q Is there an investigation going on now with respect to the activities of the FHA, sir?

MR. MULLOY: If you know, Mr. Hargis, if you know.

MR. HARGIS: I don't know.

BY MR. MILIDES:

Q You do not know?

A No.

Q Have you been reading the newspapers, sir?

A I read the newspapers in Allentown.

MR. MILIDES: That's all, sir. Thank you.

CROSS EXAMINATION

BY MR. MULLOY:

Q Mr. Hargis, just a few questions to clarify perhaps [226] procedures. Who determines when an investigation into particular activity ceases?

A Well, once I submit my report to the United States Attorney's office if they desire additional investigation I presume the investigation has not been completed. They require me to go back and do additional investigation and I investigate the case and submit all my reports, then it is in the hands of the United States Attorney's office.

Q Can the United States Attorney's office ask you to go in continued investigation?

A Yes, they can.

Q And during the time you are making an investigation to whom do you make reports?

A I submit at least one copy to my headquarters in Washington, copies to my local headquarters here, and copies to the United States Attorney's office.

Q So that the United States Attorney, is the United States Attorney's office advised as the investigation continues?

A Yes.

Q I think the question was asked when did the strike force present this case to the Grand Jury. Did the strike force present this case to the Grand Jury, this indictment?

A No, as far as I know this indictment was not presented. Of course, I was not in the Grand Jury. I don't know who [227] really did present it.

Q Who called you before the Grand Jury to testify the dates that the indictment was returned?

A The United States Attorney's office.

Q In fact, it was me, wasn't it?

A That's correct.

Q Now, I think maybe Mr. Milides was confused in your terminology because he referred to the defendant reading in the newspaper that he was arrested before he was arrested or some such thing. Would you explain the procedure when an indictment is returned?

A Well, normally when an indictment is returned a bench warrant is then issued by the clerk.

Q Just back up just a minute. Who votes on the indictment?

A The Grand Jury.

Q And then what happens to that piece of paper?

A It is returned to a Federal Judge.

Q Then what happens?

A Then if it is a true bill, then the clerk of the Court issues a bench warrant.

Q And then what happens?

A And then the bench warrant is sent to the Marshal's office.

Q And the defendant is then arrested, is he not?

A That's correct.

[228] Q At the time the indictment is returned to a federal judge is it then a matter of public record?

A Yes.

Q So that the fact a man has been indicted can be a matter of public record before he has been arrested?

A That's right.

THE COURT: Anything else?

MR. MULLOY: I think that's all.

THE COURT: Thank you, Mr. Hargis.

(Witness leaves stand.)

THE COURT: Any other witnesses?

MR. MILIDES: If your Honor pleases, the defendant rests.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL

No. 71-587

UNITED STATES OF AMERICA

vs.

GEORGE J. WILSON, JR.

Before HON. JOHN MORGAN DAVIS, JR., and a jury.

Philadelphia, Pa., March 17, 1972

THIRD DAY

Elizabeth P. Mensch
Official Court Reporter
3051 United States Courthouse
Philadelphia, Pa. 19107
WA 5-9480

• • • •

[287] NOW, 2:50 P.M., Jury returns to courtroom.

THE COURT: Will the foreman rise?

(Foreman rises.)

DEPUTY CLERK: Members of the jury, have you agreed upon your verdict?

FOREMAN: Yes.

DEPUTY CLERK: How find you? You find the defendant guilty or not guilty?

• • • •

[289] THE COURT: Anything else, gentlemen?

MR. LAUER: If your Honor please, I think there is still outstanding a motion that was previously made. I understand that can be ruled on at a later time.

THE COURT: I will rule on that in a moment. Ladies and gentlemen of the jury, I think you have done a proper job and you may now leave.

(Jury leaves courtroom.)

THE COURT: There is a motion, Mr. Lauer, you feel I have not ruled upon?

MR. LAUER: Your Honor, you indicated what your ruling would be. I just reminded the Court this morning that I don't believe a ruling has appeared on the record and that was the motion for judgment of acquittal which was made at the end of all the evidence.

THE COURT: The motion is denied.

• • • •

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL NO. 367

7390

NOVEMBER 1ST 1966

60-212
313

PAY TO THE ORDER OF EASTON MOTOR HOTEL ---------- $ 2,024.09

TWO THOUSAND, TWENTY-FOUR AND 09/100 ---------- DOLLARS

Re: Easton Arms, Inc.

EASTON NATIONAL BANK AND TRUST COMPANY
EASTON, PA.

⑆0313⑆

PAID
NOV 04 1966
EASTON NATIONAL BANK AND TRUST COMPANY

Robert Schaffer
Business Manager

FOR DEPOSIT ONLY
EASTON MOTOR HOTEL
EASTON, PA.

61

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Mail Ser. N.

Marriage License Application

96981

No. 96981

Filed June 14, 1966

Peter John Tomaino

and

Kathleen Marie Wilson

Application made June 14, 1966

License issued June 12, 1966

Recorded M. L. Docket

Book 56, Page 376

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I, John Howard Rogers Clerk of the Orphans' Court Division of the Court of Common Pleas of Northampton County do hereby certify this to be a true and correct copy of record filed in this office

Attest

Deputy Clerk of the Orphans' Court Division

BEST COPY AVAILABLE

Application for Marriage License

Filed: 6/14/66

Issued: 6/17/66

Commonwealth of Pennsylvania } ss.
County of Northampton }

We, the undersigned, in accordance with the statements hereinafter contained, the facts set forth wherein we and each of us do solemnly swear are true and correct to the best of our knowledge and belief, do hereby make application to the Clerk of the Orphans' Court of Northampton County, Pennsylvania, for a license to marry.

Peter J. Tomaino

Kathleen Marie Wilson

Q 2

STATEMENT OF MALE

Full name and surname Peter John Tomaino Race White

Occupation Teacher Birthplace Brooklyn, N.Y.

Related by blood or marriage to the person whom he desires to marry NO

Residence 614 Rugby Rd. Phillipsburg, N.J.
Street Address or R. F. D. Post Office

Age 24 years. Date of birth 4-11-42 Previous marriage or marriages NO

Date of death or divorce
of former wife or wives*

Is Applicant afflicted with any transmissable disease? NO

Name and Surname { of Father Peter Tomaino Maiden
of Mother Rosa Long Branch N.J. Name Geliardi

Residence of Father 75 Morrell St. Of Mother Same As Fathers

Race of Father White Of Mother White

Occupation of Father Mechanic Of Mother Housewife

Birthplace of Father N.J. Of Mother N.Y.

Is applicant weak-minded, insane, of unsound mind, or under guardianship as a person of unsound mind?
NO

Has applicant, within five years, been an inmate of any institution for indigent persons, weak-minded, insane or persons of unsound mind? NO

Is applicant now under the influence of any intoxicating liquor or narcotic drug? NO

Affidavit taken: 4/12/66

Peter J. Tomaino
Signature of Applicant

STATEMENT OF FEMALE

Full name and surname Kathleen Marie Wilson Race White

Occupation Secretary Birthplace Philadelphia, Pa.

Residence 4615 Charles St. Easton, Pa.

Age 21 years. Date of birth 4-20-45 Previous marriage or marriages NO

Date of death or divorce
of former husband or husbands*

Is Applicant afflicted with any transmissible disease? NO

Name and Surname { of Father George Wilson Maiden
of Mother Jo Ann Wilson Name Viscome

Residence of Father Same As Above Of Mother Same
Street Address or R. F. D. Post Office

Race of Father White Of Mother White

Occupation of Father Business Agent Of Mother Housewife

Birthplace of Father Easton, Pa. Of Mother Phillipsburg, N.J.

Is applicant weak-minded, insane, of unsound mind, or under guardianship as a person of unsound mind?
NO

Has applicant, within five years, been an inmate of any institution for indigent persons, weak-minded, insane or persons of unsound mind? NO

Is applicant now under the influence of any intoxicating liquor or narcotic drug? NO

Kathleen Marie Wilson
Signature of Applicant

Sworn and subscribed before me this 14th day of June A. D., 19 66

Marietta R. Lawrence Clerk O.C. (SEAL)

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209

Welding

Geo. Wilson

6/25/66

1788.61

JUN 28

4872

3	Bartending (Bew) e 15	x	45.00
726a	Carbage (Bew) e 2.50 ea		180.00
321	Linnis e 2.90		930.90
	Tax		53.66
	Sundry		139.65
50	lbs welding Cable e 1.50		75.00
	Tip of Cutting e 3.50		3.50
2	Plasma Punch e 4.00		8.00
36	Socket e 6.00		21.60
5	Manhatt — e 26		130.00
3	Bew e 27.00 ea.		81.00
2	Birch Bew e 9.00 ea		18.00
2	Mantum 28.00	x	56.00
9	Whiting Sons 26.	x	234.00
			1775.61

G3A

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Geo. Wilson.

JUN 18 19..

4879

48	Candles @ 25 ea	12.00 ✓
	Gum	9.00 ✓
66	Champagne @ 3.50	51.00 ✓
53	Lettuce @ 3.50	185.50 ✓
		257.50

236.52

GR.

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Valley Yarns
Cora Smith (B.y.).
Mattie
Carol C
Arlene Koch.
Sally Lucas
Flo.
Nancy Bryant
J. Riegel.
Pat M.
Barbara. (Betty Friend)
Emma Reilly
M. Troxell -
Bob Martoon
Marino
Haskins

1017.40
1002.10
9.00
12.53
139.65
1153.15

Send Bio. Yarn Cer Doc up

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.00 *
1,975.65 Δ
257.50

2,233.15 *

16 | 139.65
9
4 794
17 17 | 135.00
5 119
160
153
70
68
2

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EASTON MOTOR HOTEL LEDGER

NAME: MR. GEORGE WILSON
ADDRESS: 4615 CHARLES STREET
EASTON PA.

G #

CREDIT CARD NO.

DATE	CODE	REFERENCE	CHARGES	CREDITS	BALANCE	PROVING FACTOR
BALANCE FORWARDED						
JUN 25 65	3	4872				
		321 DINNERS @ 2.90				
		STATE TAX				
		WAITERS GRATUITY				
		3 BARTENDERS @ 15.00				
		CORKAGE ON 72 BOTS @ 2.50				
		50 LB WEDDING CAKE @ 1.50				
		CAKE				
		2 GAL @				
		3				
		W- KEY SOURS @ 26.00				
		43 CANDLES @ .25				
			1850		233.1	446630
		CHECK BY WILLIAM [illegible]				
JCV	66	CHECK FOR $2,024.09 LESS 790.94		1,233.15	1233.15 CR 0.00	246630 0.00

EXPLANATION OF NUMERICAL CODES

1. ROOMS
2. ROOM TAX
3. FOOD-DINING ROOM
4. FOOD TAX
5. COFFEE SHOP
6. BEVERAGE
7. GRATUITY
8. TELEPHONE
9. LAUNDRY & VALET
10. ALLOWANCE
11. FLOWERS
12. CIGAR STAND

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PH 46-4666
2

EASTON MOTOR HOTEL LEDGER

NAME: EASTON ARMS INC.
ADDRESS: 208 DRAKE BLDG
EASTON PA.

RE WILLIAM BURKE ATTORNEY

CREDIT CARD NO.

DATE	CODE	REFERENCE	CHARGES	CREDITS	BALANCE	PROVING
BALANCE FORWARDED						
NOV 5 65	1	14.506	36.84			
NOV 12 65	1	14.664	68.96			
NOV 19 65	1	14.928	73.20			
NOV 24 65	1	15.160	14.73			
DEC 3	1	15.279	72.32			
DEC 10 65	1	15.479	90.36			
DEC 16 65	1	15.638	61.00			
DEC 20 65	1	15.871	40.79			
DEC 20 65	1	15.877	19.77			
DEC 20 65		VALET	1.58			
DEC 20 65		LDRY	3.61			
DEC 20 65	1	15.871	18.00		495.06	
JAN 3 66	9	VALET & LDRY TRANS. TO RM. BILL		5.19	489.87	
JAN 31 66	1	FOLIO 16894	289.49		779.36	1,2
FEB 28 66	1	FOLIO 17664	248.82		1,028.18	2.05
MAR 31 66	1	FOLIO 18732	343.17		1,371.35	2.7
APR 30 66	1	FOLIO 19794	305.89		1,677.24	3.3
MAY 16 66		PERSONAL CHECK BY MR. BURKE		500.00	1,177.24	2.3
MAY 28 66	1	FOLIO 20241 - MR. BURKE CHECKED OUT	313.25		1,490.49	2.9
SEP 21 65		CHECK		700.00	790.49	1,5
NOV 66		CHECK FOR $2024.09 LESS 1233.15		790.94	0.45 CR	
~~NOV 66~~		~~TO CORRECT OVERPAY~~		~~.45~~	~~0.00~~	
NOV 66		TO CORRECT OVERPAY	.45		0.00	
DEC 14 66	1	FOLIO 1518	14.05		14.05	2
JAN 7 67		CHECK		14.05	0.00	
JAN 13 67	1	23495, FRANK HIGGINS	33.1			6
JUL 9 67	1	55505, FRANK C. HIGGINS	8.0		4.0	12

EXPLANATION OF NUMERICAL CODES -5-

1. ROOMS	5. COFFEE SHOP	9. LAUNDRY & VALET
2. ROOM TAX	6. BEVERAGE	10. ALLOWANCE
3. FOOD—DINING ROOM	7. GRATUITY	11. FLOWERS
4. FOOD TAX	8. TELEPHONE	12. CIGAR STAND

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CITY LEDGER PAYMENTS — THURSDAY, NOVEMBER 3, 1966

NAME OF ACCOUNT	CITY LEDGER AMT.	NAME OF CHECK
AUERBACH, GEO MRS.	294.99	Check & Cash
NORTHAMPTON MEDICAL AUXILIARY	141.00	Cash
GEORGE WILSON	1,233.15	ELECTRICAL WORKER
WILLIAM A BURKE	790.94	SAME
TOTAL	2,460.08	

RECEIVED BY R. Norton.

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(G5)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 71-587

UNITED STATES OF AMERICA

vs.

GEORGE J. WILSON, JR.

Charge: Embezzling funds of a labor organization
Title 29 U.S.C. Sec. 501 (c)

MOTION FOR NEW TRIAL

The Defendant, George J. Wilson, Jr., by his Attorneys, Gus Milides, Esquire and Philip D. Lauer, Esquire, respectfully move your Honorable Court to grant him a new trial for the following reasons:

1. The Court erred in denying Defendant's Motion for Judgment of Acquittal made at the conclusion of the evidence presented by the government.
2. The Court erred in denying Defendant's Motion for Judgment of Acquittal made at the conclusion of all of the evidence.
3. The verdict is contrary to the weight of the evidence.
4. The verdict is not supported by substantial evidence.
5. The Court erred in refusing to charge the Jury as requested in Defendant's Points for Charge.
6. The Defendant was substantially prejudice and deprived of a fair trial by reason of the delay of the government in bringing the matter for trial, in that, because of said delay, one witness essential to the defense has died and another such witness has become so ill as to be unable to attend Court. The testimony of these two (2) witnesses was necessary to the defense in that they would have established Defendant's lack of knowl-

edge of the payment by the labor organization of a debt of the Defendant.

7. The Court erred in denying the Defendant's Motion to Dismiss the Indictment.

8. The Court erred in denying the Defendant's Motion for Inspection of the Grand Jury Minutes.

9. The Court erred in denying the Defendant's Motion for Preliminary Hearing.

10. Defendant incorporates by reference herein all of the allegations contained in Defendant's Motion to Dismiss the Indictment, for Inspection of the Grand Jury Minutes and for Preliminary Hearing, all of which were filed prior to the trial of the within cause.

GUS MILIDES, ESQUIRE

PHILIP D. LAUER, ESQUIRE
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 71-587

UNITED STATES OF AMERICA

vs.

GEORGE J. WILSON, JR.

Charge: Embezzling funds of a labor organization
Title 29 U.S.C. Sec. 501 (c)

MOTION FOR JUDGMENT OF ACQUITTAL

The Defendant, George J. Wilson, Jr., by his Attorneys, Gus Milides, Esquire and Philip D. Lauer, Esquire, moves your Honorable Court for a Judgment of Acquittal for the following reasons:

1. The goernment failed to produce by competent, substantial evidence that the Defendant had any knowledge whatsoever of the payment by the labor organization of a debt owed by the Defendant.

2. The government failed to prove any act by the Defendant or anyone else from which it could be reasonably inferred that the Defendant had knowledge of the payment of the said obligation.

3. The government failed to prove that any acts of the Defendant were done knowingly and wilfully.

4. The government failed to prove that the funds which were used to pay the obligation of the Defendant were the funds of a labor organization. In fact, the government proved that the said funds were the funds of a non-profit corporation known as Easton Arms, Inc.

5. The government failed to prove that the Defendant did embezzle, steal, or unlawfully, knowingly and wilfully abstract or convert funds of a labor organization.

6. The government substantially prejudice the Defendant's rights by unreasonably delaying in the pre-

sentment of these charges to the Grand Jury, by reason of which delay one witness essential to the defense has died and another such witness has become ill to the extent that he is unable to appear in Court. These witnesses were necessary for the Defendant to establish his lack of knowledge of the payment of the obligation, particularly since these Defendants were the signatories of the check and presumably conducted the meetings at which the payment of such bill was approved.

7. Defendant incorporates by reference herein all of the allegations contained in Defendant's Motion to Dismiss the Indictment, for Inspection of the Grand Jury Minutes and for Preliminary Hearing, all of which were filed prior to the trial of the within cause.

GUS MILIDES, ESQUIRE

PHILIP D. LAUER, ESQUIRE
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 71-587

UNITED STATES OF AMERICA

vs.

GEORGE J. WILSON, JR.

Charge: Embezzling funds of a labor organization
Title 29 U.S.C. Sec. 501 (c)

MOTION IN ARREST OF JUDGMENT

The Defendant moves your Honorable Court to arrest the judgment for the following reasons:

1. The indictment does not state facts sufficient to constitute an offense against the United States.
2. The Court is without jurisdiction of the offense, in that there has been no showing that the labor organization from which the funds were allegedly taken is an organization in inter-state commerce, or an organization substantially affecting inter-state commerce.
3. Defendant incorporates by reference herein all of the allegations contained in Defendant's Motion to Dismiss the Indictment, for Inspection of the Grand Jury Minutes and for Preliminary Hearing, all of which were filed prior to the trial of the within cause.

GUS MILIDES, ESQUIRE

PHILIP D. LAUER, ESQUIRE
Attorneys for Defendant

SUPREME COURT OF THE UNITED STATES

No. 73-1395

UNITED STATES, PETITIONER

v.

GEORGE J. WILSON, JR.

ORDER ALLOWING CERTIORARI—Filed May 28, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is set for oral argument in tandem with No. 73-1513.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1974 534058 23

Supreme Court, U. S.
FILED
APR 4 1974

No. 73-1395.

IN THE

Supreme Court of the United States

October Term, 1973

UNITED STATES OF AMERICA,
Petitioner,

v.

GEORGE J. WILSON, JR.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PHILIP D. LAUER,
654 Wolf Avenue,
Easton, Pennsylvania 18042
Counsel for Respondent.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1395.

UNITED STATES OF AMERICA,
Petitioner,

v.

GEORGE J. WILSON, JR.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Philip D. Lauer, Esquire, counsel appearing on behalf of the Respondent, George J. Wilson, Jr., hereby presents Respondent's brief in opposition to Petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit in this case.

Respondent relies on the statements of the Petitioner with respect to the opinions below, jurisdiction, questions presented, constitutional provision and statute involved, and statements of facts.

REASONS FOR DENYING THE WRIT.

The Criminal Appeals Act, 18 U. S. C. 3731, as amended by the Omnibus Crime Control and Safe Streets Act of 1970, provides for appeals by the United States from orders of the District Court terminating criminal prosecutions in all cases in which an appeal would not violate the Double Jeopardy Clause.

The holding of the Court of Appeals in this matter constitutes a well-reasoned and predictable application of the appropriate legal principles, and does not, as alleged by Petitioner, mark a "substantial departure from prior holdings of this Court" and others. Rather, the application of the Double Jeopardy Clause, the Criminal Appeals Act, and the federal law with regard to acquittals have come together to produce varying results, depending upon the factual contexts to which they are applied. These results do not demonstrate, as alleged by Petitioner, any conflict among the Courts of Appeals over their appellate jurisdictions, but rather represent the disparity which must be expected by reason of the factual variations.

1. There appears no meaningful conflict among the Courts of Appeals regarding the appealability of a post-conviction order dismissing an indictment. The various Courts of Appeals have resolved the problem of the appealability of each such order by a careful consideration in each case of the applicability of the Double Jeopardy Clause. The achievement of different results in different factual settings has been mistaken by the Government for confusion in the principles applied.

In *U. S. v. Zisblatt,* 172 F. 2d 740 (C. A. 2), appeal dismissed, 336 U. S. 934, the Court of Appeals for the Second Circuit specifically did not hold, as stated by the Petitioner, that an appeal from a post-conviction order of the District Court dismissing an indictment under the Statute of Limitations was not barred by the Double Jeopardy Clause. Rather, that Court held that they had no jurisdiction to hear the appeal, and certified the case to the Supreme Court. Judge Learned Hand characterized the decision of the District Court as a judgment sustaining a "special plea in bar", and thus potentially appealable directly to the Supreme Court. Judge Hand also recognized a potential Double Jeopardy claim:

> "However, . . . the motions, which he did entertain and eventually granted, were all made after the trial had begun and, therefore, after the Defendant had—literally at any rate—'been put in jeopardy.' There is, therefore, a good argument for saying that no appeal lies to the Supreme Court." (172 F. 2d at 742).

U. S. v. Weinstein, 452 F. 2d 704, cert. denied, *sub nom. Grunberger v. U. S.,* 406 U. S. 917, demonstrates no disparity in this area between the Second Circuit and any other Circuit. In that case, the Second Circuit Court of Appeals granted a petition by the Government for writ of mandamus to the trial Judge, directing him to vacate his post-verdict, post-conviction order dismissing the indictment. In so doing, the Court specifically found that there had been no acquittal, and did so using the principles enunciated in *U. S. v. Sisson,* 399 U. S. 267. The factual bases for such a finding were obvious: a judgment of conviction had been entered prior to the Judge's order; the Judge himself repeatedly refused to acquit the Defendant; the Judge stated his correct belief that he had no "right" to direct acquittal for the reasons stated. Looking "at what (the) District Court did rather than at what it said it was doing", *U. S. v. Sisson,* 399 U. S. at 270, the Court found that no acquittal had been accomplished and that no double jeopardy would ensue from its order.

Among the more recent pronouncements of the Court of Appeals for the Second Circuit, and demonstrating that that Court has applied these doctrines according to the facts of each case, are *U. S. v. Jenkins,* 490 F. 2d 868 (C. A. 2), and *U. S. v. Velazquez,* C. A. 2, decided December 28, 1973, 14 Cr. L. 2330. In the former case, the Defendant was tried without jury, following which the trial Judge dismissed the indictment. The Court of Appeals, after noting that Congress intended to liberally allow appeals by the Government unless prevented by the Double Jeopardy Clause, presented an exhaustive discussion of the Double Jeopardy Clause. After reviewing *U. S. v. Sisson, supra,* at length, the Court of Appeals held:

> "In essence the Judge's post trial ruling in *Sisson* had made the jury trial a nullity and had resulted in a trial to the Judge, who had rendered a judgment of acquittal on the merits. Even though this action was based on an erroneous legal ground, the Double Jeopardy Clause prevented a new trial. . . .
>
> Although the District Judge here characterized his action as a dismissal, it is clear from the analysis in *Sisson* that for double jeopardy purposes he acquitted the Defendant. His ruling was based upon facts developed at trial, which were not apparent on the face of the indictment, and which went to the general issue of the case. The dissent here contends that the District Court's findings of fact were largely undisputed and not relevant to the pivotal legal issue in question. However, the discussion section of the District Court's opinion makes it clear that it was relying on the precise circumstances of Jenkins' case to conclude that the Supreme Court's decision . . . should not be applied retroactively to him. The District Court was not construing the statute . . . it was holding that the statute should not be applied to him as a matter of fact." *U. S. v. Jenkins, supra,* at 878.

In *U. S. v. Valazquez, supra,* the same Court held that an appeal would lie, because jeopardy had not attached when the indictment was dismissed solely on motions submitted and decided prior to trial. Thus, the significant inquiry in each case has been whether the Defendant has been placed in jeopardy, a question whose answer must and did depend on the manner and time of termination of the proceedings in the Trial Court.

In *U. S. v. Whitted,* 454 F. 2d 642 (C. A. 8), the Petitioner has presented another example of a Court applying identical legal principles in the identical manner. That the result is again different from that rendered by the Third Circuit Court of Appeals is, once again, a function of the presence of substantially different circumstances. In *Whitted,* the Eighth Circuit Court of Appeals was confronted with a dismissal by a District Judge of an indictment entirely on the basis of facts before him at the time of a pre-trial denial of a similar motion. No reliance on trial testimony was shown. Clearly, this was not an acquittal, since an acquittal has been defined in such cases as "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case . . ." *U. S. v. Jorn,* 400 U. S. 470, 478, n. 7 (1971).

In *U. S. v. McFadden,* 462 F. 2d 484 (C. A. 9), the Court of Appeals for the Ninth Circuit considered a similar dismissal of an indictment. In that case, finding that the Trial Court had dismissed the indictment on the basis of evidence produced at trial, the Court of Appeals held that the Court had acquitted Defendant, and that he could not be retried.

In *U. S. v. Esposito,* — F. 2d — (No. 72-1825, June 12, 1973), the Court of Appeals for the Seventh Circuit allowed

an appeal. However, as noted in the opinion of the Court below (Petitioner's brief, App. B., Page 8A), that Court stressed its application of the principles of *U. S. v. Sisson, supra,* but found no reliance by the Trial Judge on trial evidence in his order. See also *U. S. v. Ponto,* 454 F. 2d 647.

The holding of the Court of Appeals in the instant matter applies the same principles utilized by other Courts of Appeals in the same manner. There exists no conflict which requires resolution in this matter. The results reached by the other Courts of Appeals cited by the Government and herein were amply justified on their facts, and the principles applied require no further amplification or explanation.

2. The contentions of Petitioner with regard to the alleged misconstruction of the opinion of this Court in *U. S. v. Sisson, supra,* by the Court below are likewise without merit.

Basically, *Sisson* involved a determination that a District Judge's decision did not constitute a motion in arrest of judgment, but an acquittal.

In so holding, the Court stated the following (399 U. S. at 289-290):

> Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting (the defendant) twice in jeopardy, and thereby violating the Constitution * * *. (I)n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense," *United States v. Ball,* 163 U. S. 662, 671 (1896).

Having established this standard, this Court held that the decision before it was an acquittal (399 U. S. at 288-289):

> The same reason underlying our conclusion that this was not a decision arresting judgment—i.e., that the disposition is bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial—convinces us that the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty.

Accepting these principles, the Petitioner nonetheless argues that the decision of the District Judge herein cannot be characterized as an acquittal. Such a view of the District Court's decision in this matter clearly ignores the reliance by the District Court on facts adduced at the trial, as set forth in the District Court's opinion, and reprinted in the opinion of the Court below:

> The Court takes notice of the facts brought out in the testimony of the case concerning the potential testimony of Mr. Schaefer . . . During the trial (N. T. 133-134) the defendant indicated that he never involved himself with bookkeeping or the internal affairs of the office. Finally, Mr. Wilson stated that he ordered no one to write the check in question (N. T. 164-165).
>
> On the (g)overnment's side, it was established that the bill from the wedding reception was sent to the defendant's home address and not to the union (N. T. 62). . . . Other testimony established that Mr. Wilson controlled the union (N. T. 17), and that Mr. Schaefer and Mr. Brinker were office help who owed their jobs to the defendant (N. T. 80, 181).
>
> . . . The Court finds that the unreasonable delay was substantially prejudicial to the case of Mr. Wilson in that the only witness who could explain the circumstances of the check became terminally ill during the period of unreasonable delay. Although the govern-

met contends that this is only a showing of potential or speculative prejudice, there is an absolute certainty as a signer of all checks that Mr. Schaefer would add testimony of utmost importance to the trial. (Petitioner's brief, Appendix B, Page 7A).

Although the District Court labeled the relief granted as a dismissal of the indictment, we are cautioned by *U. S. v. Sisson, supra,* at 279, to be guided by the legal effect of the Court's decision, and not the name given it.

Clearly, the decision of the District Court was an acquittal, and *U. S. v. Sisson* was properly applied.

3. The Petitioner next contends that there is no basis for holding that the Double Jeopardy Clause bars an appeal where a verdict of guilty has been entered, and the Petitioner seeks only to correct a legally erroneous order, even if it be characterized as an acquittal.

Petitioner's reliance on *U. S. v. Kepner,* 195 U. S. 100, is misplaced. *Kepner* held that an acquittal on the general issue barred an Appellate Court from entering a judgment of conviction on appeal. As noted in *U. S. v. Jenkins, supra,* at 880:

> "Since under Philippine practice no further proceedings were required below, the decision belies any view that the Double Jeopardy Clause protects only against the vexation of a second trial. (*Fong Foo v. U. S.,* 369 U. S. 141) held that a directed acquittal barred a retrial even when it was plain that the acquittal was occasioned by clear error of the Judge. (*U. S. v. Sisson,* supra) held that when a guilty verdict had been nullified by a Judge's decision to acquit on the merits, the Double Jeopardy Clause prevented an Appellate Court from directing the entry of a judgment of conviction."

Despite the amendment to Section 3731, it is apparent that an appeal will not lie where the Double Jeopardy Clause would prevent further prosecution. *Sisson* has specifically held an "acquittal", as therein defined, to be such an event, and there appears no logical reason to conclude that the definition of "acquittal" set forth by Justice Harlan should be disturbed. That the Petitioner may be precluded from seeking a reversal of what it alone deems an erroneous order is but a necessary by-product of the zealous protection afforded the Double Jeopardy Clause by the Courts of this country.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP D. LAUER,
Counsel for Respondent.

RECEIVED
MAY 15 1974

Supreme Court, U. S.
FILED
MAY 14 1974
MICHAEL RODAK, JR., CLERK

No. 73-1395

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE J. WILSON, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1395

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE J. WILSON, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

1. The Brief in Opposition to the petition for a writ of certiorari argues that there "appears no meaningful conflict among the Courts of Appeals regarding the appealability of a post-conviction order dismissing an indictment" (Opp. 2). We respectfully submit that this conclusion is based upon respondent's misreading of the relevant opinions in this area. Contrary to respondent's suggestion and the holding below, the crucial factor in those cases in determining whether the post-conviction order was an "acquittal" was whether the order of dismissal was based on a determination that the evidence was sufficient to sustain the conviction. The decision below departs from these precedents by holding that the "critical" fact (Pet. App. 8A) in de-

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termining whether a post-conviction order is an acquittal is *not* whether the district court's order is based on a finding that the evidence was insufficient to warrant conviction, but rather whether the district court relied on evidence heard at trial (regardless of whether the dismissal is based on the sufficiency of the evidence). That holding is inconsistent with the manner in which *United States* v. *Sisson*, 399 U.S. 267, has been applied by every other court of appeals that has considered the issue.

a. Respondent argues that *United States* v. *Whitted*, 454 F. 2d 642 (C.A. 8), is distinguishable from the instant case because "[n]o reliance on trial testimony was shown" (Opp. 5). However, the opinion of the district court, which was expressly referred to by the court of appeals, shows clearly that the district court in fact relied upon evidence heard at the trial as a basis for the post-conviction order dismissing the indictment. In describing the proceedings below, the court of appeals observed (454 F. 2d at 643):

> The trial court, 325 F.Supp. 520, dismissed the indictment on March 23, 1971, stating: "*During the course of the jury trial defendant's entire testimony before the Grand Jury was read to the trial jury. I have carefully studied this testimony,* that of other witnesses who testified before the Grand Jury, and the entire proceedings which led up to the returning by that tribunal of the indictment against the defendant, and have concluded that it is impossible to determine whether the indictment against the defendant was returned on the basis of evidence or by the possible prejudice and bias of jurors or both, and accordingly must therefore dismiss the indictment." [Emphasis supplied.]

Moreover, the court of appeals in *Whitted* expressly reaffirmed the settled definition of an acquittal, *i.e.*, an order based on the insufficiency of the evidence to sustain a conviction (454 F. 2d at 646). Plainly, that standard was rejected here when the court of appeals held that a dismissal based upon pre-indictment delay was an acquittal.

b. In *United States* v. *Weinstein*, 452 F. 2d 704 (C. A. 2), certiorari denied *sub nom. Grunberger* v. *United States*, 406 U.S. 917, which respondent argues "demonstrates no disparity in this area" (Opp. 3), the court of appeals held that, under the definition adumbrated in *Sisson*, a post-conviction order terminating a prosecution is an acquittal—regardless of the label—if "the [trial] judge believed that, with the evidence taken in the light most favorable to the Government, it would still not support a conviction" (452 F. 2d at 714). Applying that test to the case before it, the court of appeals held that a post-judgment-of-conviction order dismissing an indictment in the interest of justice was not an acquittal even though the order was based on evidence heard at the trial going to the general issue in the case.

Similarly, the most recent opinion of the Court of Appeals for the Second Circuit applied the same standard. In *United States* v. *Jenkins*, 490 F. 2d 868 (C.A. 2), petition for a writ of certiorari filed April 8, 1974 (No. 73-1513), the court of appeals held that an order dismissing an indictment after a trial without a jury was an acquittal. But, again, the court of appeals

looked to the same standard established by *Sisson* that it had recognized in *United States* v. *Weinstein, supra*. Judge Friendly, writing for the court of appeals in *Jenkins*, observed (490 F. 2d at 880): "*Sisson* held that when a guilty verdict had been nullified by a judge's decision to acquit *on the merits*, the Double Jeopardy clause prevented an appellate court from directing the entry of a judgment of conviction" (emphasis supplied). Like *Sisson*,[1] and unlike this case and *United States* v. *Weinstein, supra*, the district court in *Jenkins* held—in effect—that the evidence was insufficient to warrant a conviction.[2]

c. *United States* v. *McFadden*, 462 F. 2d 484 (C.A. 9), cited by respondent (Opp. 5), like *United States* v. *Jenkins, supra*, involved a post-trial dismissal of an indictment in a Selective Service case. In holding that

[1] Jenkins was charged with knowingly failing to report for induction as ordered. The district court dismissed the indictment—after trial—on the ground that Jenkins was not legally bound to obey the order because the local board had refused erroneously to reopen his classification to consider a post-induction claim for treatment as a conscientious objector.

[2] In *United States* v. *Velazquez*, 490 F. 2d 29 (C.A. 2), petition for a writ of certiorari filed April 1, 1974 (No. 73-6493), cited by respondent (Opp. 5), the court of appeals held that a *pre-trial* dismissal of an indictment *was* appealable and announced that the Double Jeopardy Clause was intended "to limit to one the number of times a defendant may be required to submit proof of his innocence to challenge or acceptance by the other side" (490 F. 2d at 34). Here, of course, the defendant has been required to submit proof of his "innocence" only once, and a successful appeal by the United States would result in the entry of a judgment of conviction, not a new trial. Accordingly, assuming *Velazquez* is relevant in a post-guilty-verdict context, its reasoning is clearly inconsistent with that of the court of appeals in the instant case.

the order was not appealable, the Court of Appeals for the Ninth Circuit wrote (462 F. 2d at 486):

> [T]here was in fact a trial on an indictment that alleged an offense and no matter how the judge characterizes his order after having tried the case, it can only be a judgment of acquittal. The defendant's asserted constitutional privilege not to be required to fight in a particular war goes to the general issue so the court's post-trial order must be held to be a judgment of acquittal. United States v. Sisson, 399 U.S. 267 * * *.

In the present case, the defendant's asserted right to a fair trial, which was allegedly prejudiced by an unnecessary pre-indictment delay, is not one that "goes to the general issue" in the case. *United States* v. *Marion*, 404 U.S. 307, 312.

d. *United States* v. *Esposito*, 492 F. 2d 6 (C.A. 7), certiorari denied, No. 73-432, January 7, 1974, cited by respondent (Opp. 5-6), is likewise consistent with *Sisson* and the cases discussed above. There, the district court entered a post-conviction order in arrest of judgment based upon the unconstitutionality of the statute that the defendant was accused of violating. Rejecting the argument that the order was an acquittal, the Court of Appeals for the Seventh Circuit emphasized that, although the order of the district court alluded to evidence heard at the trial, the basis of the dismissal did not go to the general issue in the case (492 F. 2d at 9):

> [I]t is clear from the order that the [district] court concluded that the fatal defect in the prosecution lay in the indictment's failure

> to state and the statute's failure to require a nexus with interstate commerce which would justify federal regulation. The fact that the prosecution failed to prove such a connection, though alluded to in the order, was of no significance to the actual basis for the decision. The order was neither based upon nor limited in application to the facts of the case. Appeal, therefore, is not barred by the double jeopardy clause of the fifth amendment.

In sum, except for the holding below, the courts of appeals have construed *United States* v. *Sisson* to define an acquittal as a post-trial order "entered on the ground that the Government did not present evidence sufficient to prove [an essential element of the offense]" (*United States* v. *Sisson, supra,* 399 U.S. at 299). They reject the proposition, adopted below, that an "acquittal" results from the mere fact that the district court relies on evidence heard at the trial in dismissing an indictment (after conviction) on grounds which do not relate to the sufficiency of the evidence.

2. We argued in our petition that, even if the order of the district court be labelled an acquittal, an appeal is not barred by the Double Jeopardy Clause because petitioner would not be subject to a retrial if the United States prevailed on its appeal. Since the jury has already convicted respondent, all that is at issue is whether the district court should be directed to enter a judgment of conviction in accord with the verdict of the jury.

We have also raised this issue in our petition for a writ of certiorari (No. 73-1513) in *United States* v. *Jenkins, supra,* which the Court may wish to consider at

the same time it acts on the petition for a writ of certiorari here. We have shown in our petition in *Jenkins* that the present rules applicable to appeals from post-conviction dismissals or acquittals are neither consistent nor rational. These cases, we believe, present the Court with an opportunity to clarify a confused area of the law which is of fundamental importance to the administration of justice in the federal courts.

CONCLUSION

For the reasons stated in our petition and this reply brief, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

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BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The Judgment Order of the court of appeals dismissing the appeal (Pet. App. A) is reported at 492 F. 2d 1345. The opinion of the court of appeals denying the petition for rehearing (Pet. App. B) is reported at 492 F. 2d 1345. The memorandum and order of the district court are reported at 357 F. Supp. 619 (Pet. App. D).

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1973. A timely petition for rehearing was denied on January 15, 1974. On February 6, 1974, Mr. Justice Brennan extended the time for filing

a petition for a writ of certiorari to and including March 16, 1974. The petition was filed on March 15, 1974, and was granted on May 28, 1974, along with the petition in *United States* v. *Jenkins*, No. 73-1513, and the cases were set down for argument in tandem (App. 222). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment bars an appeal by the United States from an order of the district court, entered after a jury verdict of guilty, dismissing an indictment on the ground of unnecessary pre-indictment delay.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

18 U.S.C. 3731, as amended, 84 Stat. 1890, provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

In an indictment returned on October 28, 1971, in the Eastern District of Pennsylvania, respondent, George J. Wilson, Jr., was charged with having converted to his own use funds of a labor organization, in violation of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 501(c). The indictment alleged that on or about November 1, 1966, respondent, financial secretary and business manager of Local 367 of the International Brotherhood of Electrical Workers (App. 76, 82), had converted $1,233.15 in funds belonging to the Union, through a check issued by two officers of the Union, Robert Schaefer and Robert L. Brinker, for the purpose of paying the cost of a wedding reception for his daughter (Pet. App. B 4a).

1. THE PRETRIAL MOTIONS AND HEARINGS

On December 23, 1971, respondent filed a motion to dismiss the indictment on the ground that the delay in bringing him to trial violated the Speedy Trial Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment. At pretrial hearings on February 17 and March 14, 1972, respondent argued that the indictment should be dismissed because Schaefer and Brinker, the signatories to the check in issue, were no longer available to testify. Brinker had died in 1968 (App. 30), and Schaefer was suffering from a terminal illness (App. 15, 34).

The only witness at the February 17 pretrial hearing was Special F.B.I. Agent Joe Hargis, who testified about the conduct of the investigation of this and

other cases involving respondent. He stated that the F.B.I.'s investigation began in April 1968 and continued through July 1970, although the aspect of the investigation concerned with the instant charges was substantially complete by June 1969 (App. 20, 21, 26, 32). He also testified that by early 1970 a grand jury was investigating the matter (App. 29) and that he discussed the case with the United States Attorney's office in late 1970 and early 1971 (App. 29–30). He denied that his investigation had revealed that Schaefer was terminally ill (App. 27), and he stated that Brinker had died before he could interview him (App. 27). After the hearing, the district court denied the motion to dismiss the indictment.

At a hearing held on March 14, 1972, to reconsider the motion to dismiss the indictment, Mrs. Jean Sippel, the Local's office secretary, testified that lists of checks were brought to her by Miss Gloria Hunt, secretary of Easton Arms, Inc., a non-profit corporation created by the Local to carry out a public housing project, and that she would prepare checks marked "re Easton Arms" from this list and submit them, along with the list, to Brinker and Schaefer, who would sign the checks and corresponding vouchers (App. 39–41). She testified that the check for the wedding reception had been filled out by her and processed in this manner. The United States Attorney argued, accordingly, that since Brinker's and Schaefer's signatures were perfunctory, their inability to testify could not be prejudicial to respondent's case (App. 48).

Respondent testified that he had discussed the wedding with Brinker and Schaefer in June 1966 with reference to the guest list and that about 80 percent of those invited were connected with the union-sponsored housing project (App. 53). He also stated he never directed Mrs. Sippel to issue the check (App. 54) and that he discovered the bill for the reception had been paid during a conversation with Schaefer and Brinker about Thanksgiving or Christmas 1966. According to his testimony, they stated in regard to the bill: "Don't worry about it, it's paid," adding, "Well, it's part of promotion. It could have been just another political thing" (App. 54).

Following the hearing, respondent's motion to dismiss the indictment was again denied,[1] and the case proceeded to trial (App. 64).

2. THE TRIAL

It was established at trial that on June 25, 1966, a wedding reception was held for respondent's daugh-

[1] In denying the motion, the district court relied on *United States* v. *Dibrizzi*, 393 F. 2d 642 (C.A. 2), in which the court of appeals stated in respect to a prosecution under 29 U.S.C. 501(c) (*id.* at 645):

"Here, appellant maintains that the expense items for which the Government showed the union was billed and which the union paid were authorized and adopted by it with knowledge of all the facts and without any fraudulent misrepresentations having been made by him. However, the Government adduced at the trial enough evidence from which the jury could have found beyond a reasonable doubt that the items were personal non-business expenses and in no way incurred in furtherance of the union's business. Therefore, the jury could reasonably have inferred, in turn, that appellant intended to receive

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ter at the Easton Motor Hotel (App. 98). The manager of the hotel explained that the cost of the wedding reception had been $2,233.15, of which $1,000 had been pre-paid in the form of a deposit by William Burke, the Local's attorney,, on June 20, 1966 (App. 96–98,163). He also testified that, following the reception, a bill for the balance of the cost of the reception, $1,233.15, had been made out in the name of respondent and had been sent to his home (App. 97, 102; G–3, App. 214). The manager stated that if a bill were not paid within thirty days, it was the policy of the hotel to repeat the billing each thiry days thereafter (App. 97–98, 104). The bill was finally paid by a union check for $2,024.09 dated November 1, 1966, and endorsed by Schaefer, the president of the Local, and Brinker, its treasurer (App. 98–99, 207) [2]. The check was marked "re Easton Arms, Inc.," a reference to the non-profit

(Continued)

and knew he was receiving union funds for purely personal expenses. Thus, viewing the evidence, as we must, most favorably to the Government, * * * it appears to us that the jury quite reasonably drew the inference that this intelligent appellant was acting wilfully. Even if appellant may have established that his expenses were, as he claims, authorized and adopted by the union, such does not absolve him of his crimes; the reach of § 501(c) is not limited to union officers who engage in stealthy larcenies or devious embezzlements but extends to an officer who 'unlawfully and wilffully abstracts or converts to his own use' the funds of a labor organization. When one sends the union a voucher known to be an improper one, and then receives payment of the voucher, the crime is completed. * * *"

[2] Mrs. Sippel again testified regarding the Local's procedures for issuing checks; the testimony was substantially the same as that given at the pretrial hearing (App. 76–81, 86–91).

corporation created by the Local to build a million-dollar public-housing project, backed by a government-insured loan obtained by the corporation from a trust company (App. 78, 153, 169).[3] Although the manager of the hotel was unable to recall who directed it to do so (App. 106), the hotel applied $790.94 of the amount to the account of William Burke and $1,233.15 to satisfy the balance outstanding for the wedding reception (App. 98–100; G–4, App. 215).

Respondent testified that he had appointed Brinker and Schaefer to office jobs, under which they had authority to endorse Union checks, and that they were responsible to him as his assistants for their activity in that capacity (App. 174–175); [4] he maintained, however, that he had never authorized anyone to issue the Union check used to pay his bill for the wedding reception (App. 164). Respondent also stated that he had reimbursed Burke for the $1,000 deposit, that

[3] The project, a low-to-moderate-income apartment complex known as Kennedy Gardens, was, according to respondent's testimony, being constructed by the Union for the community in the anticipation that the building eventually would revert back to the non-profit corporation and could be used for the Union's pension fund (App. 147, 150). Respondent, Brinker, Schaefer, and Burke served on the Board of Directors of Easton Arms, Inc. (App. 80, 177–178). It was common for certain expenses of Easton Arms, Inc., eventually amounting to about thirty to forty thousand dollars, to be advanced by the Union (App. 80).

[4] These office jobs were distinct from the official Union positions held by Brinker and Schaefer, and their function in issuing the checks was unrelated to their official positions. In their office capacities, they served as respondent's agents (App. 113–114).

about Thanksgiving or Christmas of 1966 Brinker had told him that the bill for the balance had been paid, and that he had assumed that Burke had paid it (App. 196, 163–164). He maintained, however, that he did not know that the bill had been paid from union funds until he read about his indictment in the local newspaper (App. 164).

Respondent further testified that it was often necessary for him to "wine * * * and dine" prominent persons at the Easton Arms Hotel to obtain their support for the housing project (App. 157) and that these expenses were paid by the Union, which would be reimbursed by Easton Arms, Inc., when funds became available (App. 116–117, 157–158). Moreover, in addition to certain members of the Union, persons who were in government positions and could be helpful in obtaining tenants and approval for additional units for the Kennedy Gardens project had been invited to his daughter's wedding reception (App. 162).

Respondent also offered testimony of Agent Hargis regarding the course and duration of the pre-indictment investigation (App. 197–204).

At the close of the prosecution's case-in-chief, respondent moved for a directed verdict of acquittal on the ground that none of the witnesses had testified that respondent had given instructions directing payment of the hotel bill (App. 131; Tr. 109–110). The district court, again citing *United States* v. *Dibrizzi*, *supra*, denied the motion, concluding that there was sufficient evidence to go to the jury (Tr. 110–113). After the return of the guilty verdict, the judge denied a renewed motion for a judgment of acquittal (App. 206).

3. THE POST-TRIAL MOTIONS AND THE DISMISSAL OF THE INDICTMENT

On March 23, 1972, respondent filed post-trial motions for arrest of judgment, judgment of acquittal, and a new trial. Each of these motions again asserted, *inter alia*, the alleged unreasonable delay in presenting the charges to the grand jury as a ground for relief (App. 217, 219, 221). Each of the motions likewise incorporated by reference respondent's pretrial motion to dismiss the indictment (App. 218, 220, 221).

On April 18, 1973, the district court entered an order dismissing the indictment pursuant to Rule 48(b), Fed. R. Crim. P.[5] After discussing the criteria set forth in *United States* v. *Marion*, 404 U.S. 307, regarding the circumstances under which an indictment may be dismissed for pre-indictment delay, the district court held that the pre-indictment delay in this case deprived respondent a fair trial. In reaching this conclusion, the district court took "notice of the facts brought out in the testimony of the case concerning the potential testimony of Mr. Schaefer" (Pet. App. D, 14a–15a):

[5] The district court's order, which was appended to its memorandum (Pet. App. D, 11a–15a), was inadvertently omitted from our appendix to the petition for certiorari. It stated:

"AND NOW, this 18th day of April, 1973, it is hereby Ordered that the above captioned case is Dismissed with prejudice pursuant to Rule 48(b) of the Federal Rules of Criminal Procedure."

We note that, as a technical matter, Rule 48(b) applies only to *post-arrest*, pre-indictment delay. *United States* v. *Marion*, *supra*, 404 U.S. at 319 n. 11. Accordingly, it would not be applicable here.

Mr. Wilson, the defendant, stated (40–41 of the Notes of Testimony of the pre-trial hearing held on March 14, 1972) that the signing of all union checks was in the hands of Mr. Brinker and Mr. Schaefer. During the trial (N.T. 133–134) the defendant indicated that he never involved himself with bookkeeping or the internal affairs of the office. Finally, Mr. Wilson stated that he ordered no one to write the check in question. (N.T. 164–165).

On the Government's side, it was established that the bill from the wedding reception was sent to the defendant's home address and not to the union (N.T. 62). Also, Mrs. Jean Sippel, the office secretary for the I.B.E.W. and the individual who prepared the checks for the signature of Mr. Brinker and Mr. Schaefer stated that at no time had a check prepared by her been sent back without being signed. Other testimony established that Mr. Wilson controlled the union (N.T. 17), and that Mr. Schaefer and Mr. Brinker were office help who owed their jobs to the defendant. (N.T. 80, 181).

The district court concluded (Pet. App. D 15a):

> [T]he unreasonable delay was substantially prejudicial to the case of Mr. Wilson in that the only witness who could explain the circumstances of the check became terminally ill during the period of unreasonable delay. Although the government contends that this is only a showing of potential or speculative prejudice, there is an absolute certainty as a signer of all checks that Mr. Schaefer would add testimony of utmost importance to the trial. Because of the unreasonable delay, substantial prejudice resulted which violated the defendant's due process rights under the Fifth Amendment.[6]

The district court made no effort to reconcile this order with its pretrial order denying the motion to dismiss. Although the district court did allude to evidence heard at the trial, it failed to indicate what that evidence added to facts already disclosed at the pretrial hearing. Moreover, the district court likewise made no effort to reconcile its finding regarding the significance of Mr. Schaefer's testimony with its charge to the jury, under which the jury could have convicted whether or not Mr. Schaefer or Mr. Brinker was expressly ordered by respondent to write the check (Tr. 275–276).

4. THE APPEAL TO THE COURT OF APPEALS

The United States filed a notice of appeal pursuant to the Criminal Appeals Act, 18 U.S.C. 3731, which authorizes an appeal to the court of appeals from an order of the district court dismissing an indictment "except * * * where the double jeopardy clause of the United States Constitution prohibits further prosecution." On September 21, 1974, the court of appeals, relying upon *United States* v. *Sisson*, 399 U.S. 267, held that "the district court's order [was] not appealable * * * under 18 U.S.C. 3731" and entered a

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[6] The district court concluded that respondent had not been prejudiced by unreasonable delay due to the unavailability of Brinker, who died in 1968 (Pet. App. D 14a):

"* * * Mr. Brinker died prior to 1970 and consequently his testimony would have no bearing on the question of prejudice during the period of unreasonable delay which commenced in late 1970."

"Judgment Order" dismissing the indictment (Pet. App. A).[4]

On the assumption that the court of appeals was relying on that portion of *Sisson* that had construed the old Criminal Appeals Act "as confining the Government's right to appeal—except for motions in arrest of judgment—to situations in which a jury has not been impaneled" (399 U.S. at 302–303), a petition for rehearing or rehearing *en banc* was filed, since it was plain from the legislative history that Congress intended to overrule *Sisson* when it amended the Criminal Appeals Act (18 U.S.C. 3731) to permit appeal from a dismissal of an indictment except where the Double Jeopardy Clause prohibits further prosecution.[5] Moreover, on the authority of cases such as *United States* v. *Dooling*, 406 F. 2d 192 (C.A. 2), certiorari denied *sub nom. Persico* v. *United States*, 395 U.S. 911, which held that it was improper for a district court judge to grant a post-trial motion to dismiss an indictment on the same grounds examined and rejected prior to trial, and that mandamus was available to set aside such a dismissal, a petition for a writ of mandamus was filed as an alternative to the petition for rehearing.

On January 15, 1974, the court of appeals denied the motion for rehearing in a six page opinion (Pet. App. B 3a–9a).[6] Rather than relying on a con-

[4] See S. Rep. No. 91-1296, 91st Cong., 2nd Sess., p. 11:

"One example of the kind of case which would thereby be made appealable is the *Sisson* case".

[5] The petition for rehearing *en banc* was denied with one judge dissenting (Pet. App. C 10a). The court of appeals also denied the application for a writ of mandamus (*ibid.*).

struction of Section 3731, the court of appeals held that the post-conviction dismissal for unnecessary delay in prosecution was an acquittal and that further appellate review was barred by the Double Jeopardy Clause.

The court of appeals held that, regardless of label, "[t]he trial judge's disposition is an 'acquittal' if it is 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case'" (Pet. App. B 6a). Although the basis of the dismissal had nothing directly to do with the general issue in the case (the defendant's guilt or innocence), the court of appeals held that, since the facts relied on were also relevant to a determination of the general issue, the dismissal was in fact an acquittal (Pet. App. B 6a):

> While there may be occasions where an appeal may lie from a district court's dismissal of an indictment or information because further prosecution is not barred in the double jeopardy clause, we cannot agree that this is such a case. Here the record indicates that defendant filed post-trial motions for arrest of judgment, judgment of acquittal, and for a new trial. The district court, in reaching its legal determination, relied on facts adduced at trial relating to the general issue of the case.

Having concluded that the order was an "acquittal," the court of appeals, relying on *United States* v. *Sisson*, *supra*, 399 U.S. 267, held that appellate review was barred even though the only relief sought was an order vacating the dismissal and directing the entry of a judgment of conviction (Pet. App. B 6a):

> Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution * * *. [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence," *United States* v. *Ball*, 163 U.S. 662, 671 (1896).

ARGUMENT

I

INTRODUCTION AND SUMMARY

The Criminal Appeals Act, as amended by the Omnibus Crime Control and Safe Streets Act of 1970 (84 Stat. 1890), was expressly intended to authorize a government appeal from an order of the district court terminating a criminal prosecution in any case in which appeal would not violate the Double Jeopardy Clause. The Act, as the court of appeals held in this case, "establish[es] the double jeopardy clause as the only bar to appeals by the United States from a dismissal of an indictment or information" (Pet. App. B 6a).[9]

[9] The original version of the 1970 amendment to the Criminal Appeals Act proposed by the Senate Judiciary Committee, unlike the final version, was not pegged specifically to the Double Jeopardy Clause. Instead, it provided for an appeal from all orders terminating a criminal prosecution "except that no appeal shall lie from a judgment of acquittal" (S. Rept. No. 91-1296, *supra*, at 1). The Senate Report defined a "true acquittal" as one "based upon the insufficiency of the evidence to prove an element of the offense" (*id.* at 24). See also letter of Solicitor General Erwin N. Griswold, responding to a request [Continued]

The only issue presented in this case, therefore, is whether the Double Jeopardy Clause bars an appeal from an order, entered after a jury verdict of guilty, dismissing an indictment because of unnecessary pre-indictment delay. The conclusion of the court of appeals that such an appeal is barred by the Double Jeopardy Clause was based on its determination: (1) that the Double Jeopardy Clause bars an appeal from a judgment of acquittal entered notwithstanding a jury verdict of guilty, even when a successful appeal would not result in a retrial but merely in the entry of a judgment of conviction in accordance with the verdict of the jury, and (2) that a post-conviction order dismissing an indictment, which was not based on the sufficiency of the evidence, is an acquittal. We submit that both of those determinations were erroneous.

1. The issue whether the Double Jeopardy Clause bars an appeal from an order terminating a criminal prosecution in favor of the accused does not, in our view, depend on the label attached to the order, but upon whether the relief sought would improperly subject a defendant to a second trial. Our brief in *Serfass* v. *United States*, No. 73-1424, explores this issue in the context of a *pretrial* order dismissing

[Continued]
from Senator John L. McClellan for his views on the proposed amendment (*id.* at 33):

"As stated above, S. 3132 closes these gaps by allowing the Government an appeal from any dismissal except one amounting to a 'judgment of acquittal', that is, a factual judgment that the defendant is not guilty of the crime charged and is thereby entitled to protection against double jeopardy."

an indictment on the merits. There we show that, even though such a pretrial order has been or could be characterized as an "acquittal," an appeal by the United States does not violate the Double Jeopardy Clause because the defendant had never been placed in initial jeopardy by the commencement of a trial. Accordingly, even though the appeal seeks a reversal of the order of dismissal and a remand for trial, the defendant cannot complain that he is being placed in jeopardy of a second trial for the same offense.

In the instant case and in *United States* v. *Jenkins*, No. 73-1513, on the other hand, the order dismissing the indictment was entered after trial. But since in both cases the appeal seeks a remand to the district court for further proceedings that would not involve a retrial, it follows similarly that the defendant cannot complain that he is in jeopardy of being tried twice for the same offense. Indeed, for years this Court entertained direct appeals from post-verdict orders in arrest of judgment, where the relief sought was an order compelling the entry of a judgment of conviction in accordance with the verdict of the trier of fact.

Moreover, had the district court here entered a judgment of conviction, and had it been the court of appeals that directed dismissal of the indictment on the ground of pre-indictment delay, there would be no question about the right of the United States, consistent with the Double Jeopardy Clause, to seek further review by way of a petition for rehearing or a petition for a writ of certiorari. Indeed, this Court

has declined to "subscribe to * * * a theory" that would bar such relief from an order of the court of appeals (*Forman* v. *United States*, 361 U.S. 416, 426) and has repeatedly entertained petitions for writs of certiorari from orders of courts of appeals directing the dismissal of indictments on the merits after a judgment of conviction had been entered.[10] There is no reason, as a matter of law or policy, why different rules should apply simply because it is a district court that has directed the dismissal of an indictment under similar circumstances. As Judge Learned Hand wrote for the court of appeals in *United States* v. *Zisblatt*, 172 F. 2d 740, 743 (C.A. 2), appeal dismissed, 336 U.S. 934:

> * * * [T]he question becomes whether to reverse the dismissal and enter a judgment of conviction upon the verdict would violate the defendant's constitutional privilege. Had the trial judge directed a verdict, so that it would have been necessary upon reversal to subject the defendant to trial before a second jury, that would be "double jeopardy", but, although the Constitution gives an accused person the benefit of any mistakes in his favor of the first jury he encounters, whether it has passed upon his guilt or not, it does not extend that privilege to mistakes in his favor by judges. Indeed, were the opposite true, all appeals from decisions in arrest of judgment would be constitutionally futile because no judgment of conviction could be entered when they were reversed.

[10] *E.g.*, *United States* v. *Maze*, 414 U.S. 395; *United States* v. *Russell*, 411 U.S. 423.

> So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it do not trench upon the constitutional prohibition.

Our brief in *United States* v. *Jenkins*, No. 73-1513, which was set down by this Court for argument in tandem with the instant case, fully discusses this issue and sets forth our arguments in support of the view that the Double Jeopardy Clause does not bar an appeal from a post-jeopardy dismissal of an indictment after the finder of fact has determined that the defendant committed the acts charged in the indictment, even where the order may be properly characterized as an acquittal. We shall, therefore, rely on our brief in *Jenkins* with respect to that issue and concentrate our argument in this brief on the alternative claim that, even assuming an appeal by the United States from a post-verdict judgment of acquittal is barred by the Double Jeopardy Clause, a dismissal of an indictment for unnecessary delay in prosecution is not an acquittal.

2. The issue whether a judge's action amounts to an acquittal, as Mr. Justice White has observed, "admits of no single answer, but depends on the reasons for making the inquiry in the first place." *United States* v. *Sisson*, 399 U.S. 267, 328-329 n. 4 (dissenting opinion). We have already stated our view that, in terms of the "reason for making the inquiry here," it is irrelevant what label is attached to the judgment of the district court; the critical issue is whether a successful appeal will result in a retrial. Accordingly, to the extent that it may be said that the Double

Jeopardy Clause bars an appeal from a judgment of "acquittal," it does so only where the "acquittal" has been returned by the trier of fact, and a ruling against the defendant on appeal would require a retrial.

While there is dictum in some opinions suggesting that an appeal from an "acquittal" would be barred even where such a retrial would not be necessary,[11] the common thread that runs through every statement or restatement of the rule, is that, to be unappealable, the judgment of acquittal must have been based upon a determination that the defendant has not been proven guilty of the crime for which he has been tried. Under that settled definition, it is plain that the order in this case, terminating the prosecution on the ground of unnecessary delay in indictment, which "rested on grounds that had nothing to do with guilt or innocence or the truth of the allegations in the indictment" (*United States* v. *Marion*, *supra*, 404 U.S. at 312), was not an acquittal. And, indeed, even these courts of appeals which have held that a *pretrial* dismissal on the merits is an "acquittal" and therefore not appealable have consistently entertained appeals from pretrial dismissals based on unnecessary delay.

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[11] Largely because an appeal from a judgment of acquittal entered upon a verdict of not guilty by a jury of necessity involves a request for a second trial, it has become common shorthand to say that the Double Jeopardy Clause bars an appeal from a judgment of acquittal; as sometimes happens, the reason for the rule has been ignored on occasion, and there is in fact authority, at least by way of dictum, that an acquittal entered notwithstanding a verdict of guilty by a jury could not be appealed without violating the Double Jeopardy Clause even though a retrial is not sought. As previously indicated, we deal with this in our brief in *Jenkins*.

Largely ignoring this crucial elementt in the definition of an "acquittal," the court of appeals here relied upon language, taken out of context,, from *United States* v. *Sisson, supra,* 399 U.S. at 289–290 n. 19, to the effect that a judge's disposition is am "acquittal" if it is "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case" (Pet. App. B 6a). It is apparent in context that the Court in *Sisson* did not intend to formulate any new definition of an acquittal, but merely to restate the rule that the termination of a prosecution after trial based on a resolution of the general issue in the case in favor of the defendant is an acquittal. However, the court of appeals here construed the language literally, finding it to mean that an acquittal results any time the order terminating the prosecution after trial is based upon evidence heard at the trial, without regard to whether the dismissal is based upon a determination that a defendant has not beem proven guilty. Such a definition of the term "acquitttal" is contrary to every authority that has considered the concept, going back even to Blackstone's famous statement of the double jeopardy principle.

II

AN ORDER TERMINATING A PROSECUTION BECAUSE OF UNNECESSARY DELAY IN INDICTMENT IS *NOT* AN ACQUITTAL

The order of the district court tterminating the prosecution in this case on the groundl of unnecessary pre-indictment delay was not based upon a determination that the evidence presented tto the jury was

insufficient to establish respondent's guilt; indeed, the district court twice denied respondent's motion for a directed verdict of acquittal (once after the close of the prosecution's case-in-chief and again after the return of the guilty verdict; see *supra*, p. 8). Moreover, *United States* v. *Marion, supra*, 404 U.S. 307, makes clear, if any authority is necessary, that an order terminating a criminal prosecution on the ground of unnecessary delay does not involve a determination of the defendant's guilt or innocence. In *Marion* the district court had granted a pretrial motion to dismiss the indictment on the ground of unreasonable delay in bringing the indictment, stating that the defense of the case was "bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968" (404 U.S. at 310). This Court, construing the old Criminal Appeals Act, concluded that the order of the district court could be appealed. In doing so, it rejected the notion that the district court's ruling could be considered a determination relating to the guilt or innocence of the accused (404 U.S. at 312):

> The motion to dismiss rested on grounds that had nothing to do with guilt or innocence or the truth of the allegations in the indictment but was, rather, a plea in the nature of confession and avoidance, that is, where the defendant does not deny that he has committed the acts alleged and that the acts were a crime but instead pleads that he cannot be prosecuted because of some extraneous factor, such as the

running of the statute of limitations or the denial of a speedy trial.

Moreover, while the Court observed in *Marion* that a determination whether a defendant suffered actual prejudice as a result of unnecessary delay must sometimes await the events at trial,[12] it seems clear that the determination of this issue after trial has no more to do with a defendant's guilt or innocence than a pretrial dismissal of an indictment on the same ground would have. Indeed, it is apparent that events at trial in the instant case disclosed very little in addition to what had already been disclosed at the pretrial hearings. What happened, quite simply, is that the district judge changed his mind. The issue therefore is whether this order is converted into an unappealable "acquittal" for the purposes of the Double Jeopardy Clause merely because the district court relied upon evidence heard at the trial that was also, quite fortuitously, relevant to the general issue of respondent's guilt or innocence. That it is not so converted emerges plainly from a consideration of the history of the Double Jeopardy Clause and the cases that have construed it.

[12] The Court stated (404 U.S. at 326):

"In light of the applicable statute of limitations, however, these possibilities ['inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost'] are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment. Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature."

A. THIS DISMISSAL WAS NOT AN ACQUITTAL UNDER THE COMMON LAW DEFINITION OF THE CONCEPT

The starting point for the present inquiry is the definition of acquittal under the common law rule, which the framers intended to perpetuate in the Double Jeopardy Clause. See *Kepner* v. *United States*, 195 U.S. 100, 125. The most succinct statement of that rule, and one "which greatly influenced the generation that adopted the Constitution,"[13] is found in 4 *Blackstone's Commentaries*, Ch. XXVI, pp. 335–336 (1900). There, in describing the common law plea of *autrefoits acquit*, Blackstone observed:

> * * * [T]he plea of *autrefoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. And hence it is allowed as a consequence, *that when a man is once fairly found not guilty upon any indictment*, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime. [Emphasis added.]

Similarly, IV Hawkins' *Pleas of the Crown* (1795 ed.) described the common law plea of "former acquittal" as resting on a determination that the defendant was not guilty (pp. 311–312):

> The plea of *autrefoits acquit* is grounded on this maxim, that a man shall not be brought into

[13] *Green* v. *United States*, 355 U.S. 184, 187–188.

tion in the trial court)."[15] Friedland, *Double Jeopardy* 285–286 (1969). The underlying basis of this rule was apparently the concern that, upon a new trial, the prosecutor "would see where he failed, and might use ill means to prove what he failed before." 21 Viner, *A General Abridgment of Law and Equity* 478–479 (1793 ed.). But, of course, whatever validity there is to this consideration of policy, it is unrelated to the correctness of characterizing the order here as an "acquittal"; moreover, the policy underlying this aspect of the common law rule is inapplicable to the instant case since a retrial is not being sought.

In sum, it is plain that, under the definition of "acquittal" as that term was applied at common law in determining the scope of the protection afforded by the "universal maxim * * * that no man is to be brought into jeopardy of his life more than once for the same offense," an order terminating a prosecution on the ground of unreasonable delay in indictment, after a guilty verdict, is not an acquittal.[16] As we

[15] Cf. *United States* v. *Jenkins*, 490 F. 2d 868, 873–874 (C.A. 2), certiorari granted May 28, 1974 (No. 73-1513), where Judge Friendly wrote:

"The history [of the Double Jeopardy Clause] may leave it open to argue that the framers did not regard the crown's inability to appeal an acquittal after a trial on the merits as part of the common law concept of double jeopardy but rather as an independent principle, to be followed for a century [in England] but not incorporated in the clause, although the general flavor of the debate * * * is somewhat to the contrary."

[16] "In England [under the common law] the judge could not even direct a verdict of acquittal for legal insufficiency of the evidence; his only power, at least in cases involving felonies, was to recommend royal clemency, which was granted as a

[Continued]

danger of his life for one and the same offense, more than once. From whence it is generally taken, by all the books, as an undoubted consequence, *that where a man is once found "not guilty" on an indictment* or appeal free from error, and well commenced before any court which hath jurisdiction of the cause, he may, by the common law, in all cases whatsoever plead such acquittal in bar of any subsequent indictment or appeal for the same crime. [Emphasis added.]

More specifically, Hawkins observed (*id.* at 316):

Yet it seems, that no other discharge of an indictment will bar an appeal, and no other discharge of an appeal will bar an indictment, but only an acquittal by battle, or *an acquittal by verdict on the general issue*, finding the defendant's innocence; as where it finds him not guilty on such an issue, on an indictment or appeal of any felony whatsoever; or where it finds him guilty of homicide *se defendendo*, or *per infortunium*, on an indictment of murder.[14] [Emphasis added.]

While this common law plea of "former acquittal" was essentially an application of the doctrine of res judicata and did not therefore bar an appeal, "an independent principle" evolved that the Crown *could not seek a new trial* after an acquittal (by appeal or by mo-

[14] The "appeal" to which Hawkins made reference was not the contemporary American process of appellate review of trial errors, but rather the quasi-criminal trial proceeding which could be commenced at common law by a private party. See Friedland, *Double Jeopardy* 8 (1969); Kirk, *"Jeopardy" During The Period Of The Year Books*, 82 U. Pa. L. Rev. 602, 605–606.

now show, the Double Jeopardy Clause has in this respect been construed in the same manner as the English common law principle.

B. THE DISMISSAL WAS NOT AN ACQUITTAL UNDER THE ESTABLISHED CONSTRUCTION OF THE DOUBLE JEOPARDY CLAUSE BY THIS COURT

The leading case, in which it was first stated that a "verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy," was *United States* v. *Ball*, 163 U.S. 662, 671. *Ball* involved a "verdict of the jury, after a trial upon the issue of guilty or not guilty" (*id.* at 670), and it was in this context that it was held "that a general verdict of acquittal upon the issue of not guilty to an indictment * * * is a bar to a second indictment for the same [offense]" (*id.* at 669).[17]

A similar definition of an "acquittal" was employed in *Kepner* v. *United States*, *supra*, 195 U.S. 100, which involved an appeal from a judgment of acquittal after a trial without a jury. There, in discussing the *Ball* case, it was stated (195 U.S. at 133):

> The *Ball* case, 163 U.S., *supra*, establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the Government.

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matter of course." *United States* v. *Weinstein*, 452 F. 2d 704, 715 (C.A. 2), and authorities cited, certiorari denied *sub nom. Gruenberger* v. *United States*, 406 U.S. 917.

[17] Since a subsequent prosecution, rather than an appeal, was involved in *Ball*, the statement regarding the nonappealability of an acquittal (163 U.S. at 671) is dictum.

> *The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty;* to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense * * *. [Emphasis added.]

Thus, the essence of the concept of "acquittal" has long been recognized as involving the failure of the prosecution to submit convincing evidence establishing the existence of every element of the offense, *i.e.*, the prosecution's failure to adduce sufficient evidence of the defendant's guilt. As *United States* v. *Marion* (discussed more fully at pp. 21–22, *supra*) clearly holds, a motion to dismiss on grounds of pre-indictment delay has "nothing to do with guilt or innocence or the truth of the allegations in the indictment * * *." 404 U.S. at 312. It is thus unquestionably not an "acquittal" under the established meaning of the term.

The court of appeals in the instant case ignored both the common law definition of an acquittal and the oft-cited opinions in *Ball* and *Kepner* in concluding, without a functional analysis of the nature of the district court's action, that the dismissal for pre-indictment delay was an acquittal. It relied upon the Court's reformulation of the concept in *United States* v. *Sisson*, *supra*, 399 U.S. 267, reiterated in *United States* v. *Jorn*, *supra*, 400 U.S. 470, 478 n. 7:

> [T]he trial judge's disposition is an "acquittal" if it is "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case * * *."

We do not dispute that it is literally true that the evidence on which the district court relied in dismissing the indictment was "adduced at the trial" (it was, of course, also adduced at the pretrial hearings) and that (quite coincidentally) it related "to the general issue of the case" as well as to the quite distinct issue on which the judge ruled in dismissing the indictment. We do urge that the court of appeals' literal application of the *Sisson-Jorn* formulation erroneously extended the concept to circumstances to which it was never intended to apply.

When examined in context, we submit that the Court's real meaning could be more precisely, albeit less elegantly, stated by the addition of the following bracketed phrase to the definition of "acquittal": "* * * an 'acquittal' * * * is 'a legal determination [*of the general issue of the case*] on the basis of facts adduced at the trial relating to the general issue of the case.' " [14] As so stated, it is clear that the fortuitous circumstance that the facts relied on for dismissal are also relevant to the issue of guilt or innocence is not controlling, so long as guilt or innocence is not the basis of the trial court's ruling. This view is entirely consistent with *Sisson* and *Jorn*.

In *Sisson*, where the offense was a refusal to submit to induction into the armed services, the defendant claimed before trial that he was a conscientious objector to military service in Vietnam. At trial,

[14] Of course, in *Sisson* and *Jorn* the Court did not need the added phrase because, as we show below, it was not relevant to the discussion of the concept of acquittal in those cases.

Sisson based his defense principally upon his contention that American participation in the conflict was illegal but presented evidence in support of his conscientious objection claim as well. After a guilty verdict, the district court granted what it termed a motion in arrest of judgment, holding that the Free Exercise Clause of the First Amendment prohibited Sisson's conviction for refusal to submit to induction. The judge recited the facts of the case and explained that Sisson's testimony and demeanor as a witness gave support to his claim of conscientious objection to service in Vietnam.

On appeal, this Court rejected the district court's characterization of its order as an "arrest of judgment" (which would have been appealable under the terms of the old Criminal Appeals Act) and described it instead as an acquittal. In explaining why the post-guilty-verdict order was the equivalent of a judgment of acquittal, the Court analogized the case "to one in which a jury was instructed" that it was obligated to return a verdict of not guilty if it found that the defendant was "sincere" and had been governed in his refusal to report for induction "by conscience as a martyr obedient to an orthodox religion" (399 U.S. at 289). Had the jury returned a verdict of not guilty upon this charge—even though the charge was erroneous—"its verdict of acquittal could not be appealed under [former] § 3731" or, according to the Court's dictum, the Double Jeopardy Clause (*ibid.*).

The Court then explained the bearing of its hypothetical case on a case like *Sisson*, in which the dis-

trict court entered the judgment after a guilty verdict (*id.* at 290; footnote omitted):

> There are three differences between the hypothetical case just suggested and the case at hand. First, in this case it was the judge—not the jury—who made the factual determinations. This difference alone does not support a legal distinction, however, for judges, like juries, can acquit defendants, see Fed. Rule Crim. Proc. 29. Second, the judge in this case made his decision *after* the jury had brought in a verdict of guilty. Rules 29(b) and (c) of the Federal Rules of Criminal Procedure, however, expressly allow a federal judge to acquit a criminal defendant after the jury "returns a verdict of guilty." And third, in this case the District Judge labeled his post-verdict opinion an arrest of judgment, not an acquittal. This characterization alone, however, neither confers jurisdiction on this Court, see n. 7, *supra*, nor makes the opinion any less dependent upon evidence adduced at the trial. In short, we see no distinction between what the court below did, and a post-verdict directed acquittal.

The emphasis on Rule 29 is significant, because a district court may grant a judgment of acquittal pursuant to Rule 29 only "if the evidence is insufficient to sustain a conviction." And it was for this reason that the Court observed in *Sisson* that "what the District Court did in this case cannot be distinguished from a post-verdict acquittal entered on the ground that the Government did not present evidence sufficient to prove [an essential element of the offense] that Sisson was insincere" (399 U.S. at 299).

The single sentence from the opinion in *Sisson*, which was quoted in *Jorn* and formed the basis for the holding of the court of appeals below, appeared in a footnote to the textual discussion set forth above analogizing the district court's order in "arrest of judgment" to a judgment of acquittal pursuant to Rule 29. Mr. Justice White's dissenting opinion had criticized the analogy, contending that the appealability of the order should be governed by what the district court actually did, not what it might have done. It was in rejoinder to that criticism that the Court observed (399 U.S. at 290 n. 19):

> Our conclusion does not, as suggested in dissent, *post*, at 327 (dissenting opinion of MR. JUSTICE WHITE), rest on the fact the District Court "might have" sent the case to the jury on the instruction referred to in the text, but instead on what it did do—*i.e.*, render a legal determination on the basis of facts adduced at the trial relating to the general issue of the case, see, *infra*, at 301. Neither dissenting opinion explains what "large and critical" difference, *post*, at 329, exists between its expansive notion of what constitutes a decision arresting judgment and *a post-verdict acquittal entered by the judge after the jury has returned a verdict of guilty pursuant to Fed. Rule Crim. Proc. 29.* * * * [Emphasis added.]

It is apparent in context that the phrase "legal determination on the basis of facts adduced at the trial relating to the general issue" merely described the legal determination that must be made on a Rule 29 motion for a judgment of acquittal, *i.e.*, whether the

evidence is sufficient as a matter of law to establish each of the essential elements of the crime. This is entirely consonant with the traditional definition of acquittal at common law and as described in *Ball* and *Kepner;* it has, moreover, nothing to do with expanding the concept of acquittal to cover actions taken on a basis other than the establishment of guilt or innocence.

There is nothing in the brief reference to *Sisson* in *Jorn* that supports a contrary conclusion. *Jorn* involved an appeal from an order dismissing an information on double jeopardy grounds after a district judge had improperly and unilaterally declared a mistrial to permit several witnesses to consult with their attorneys in order to determine whether they should waive their privilege against self-incrimination and testify. Justices Black and Brennan, who concurred in the judgment affirming the dismissal, concluded "that the Court lacks jurisdiction over this appeal *under* [*former*] *18 U.S.C. § 3731* because the action of the trial judge amounted to an acquittal of appellee and therefore there was no discretion left to the trial judge to put appellee again in jeopardy" (400 U.S. at 488; emphasis added). Responding to this argument, Mr. Justice Harlan wrote (*id.* at 478 n. 7):

> It is clear from the record in this case that Judge Ritter's action cannot, as two members of the Court suggest, be classified as an "acquittal" for purposes of this Court's jurisdiction over the appeal under 18 U.S.C. § 3731. * * *
>
> Of course, as we noted in *Sisson, supra*, at 290, the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction. But *Sisson* goes on to articulate the criterion of an "acquittal" for purposes of assessing our jurisdiction to review: the trial judge's disposition is an "acquittal" if it is "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case * * *." *Sisson, supra*, at 290 n. 19. The record in this case is utterly devoid of any indication of reliance by Judge Ritter on facts relating to the general issue of the case, thereby surely distinguishing this case from *Sisson*, and, one would think, under the very reasoning of *Sisson*, compelling the conclusion that whatever else Judge Ritter may have done, he did not "acquit" the defendant in the relevant sense.

It is apparent, first, that the "relevant sense" in which it was necessary to determine if the district court's order in *Jorn* was an "acquittal," was for purposes of the *statutory* inquiry whether the subsequent order dismissing the indictment was appealable under former Section 3731, which had been construed in light of its peculiar legislative history (*United States* v. *Sisson, supra,* 399 U.S. at 289). On the other hand, the issue in this case is whether an appeal from the order dismissing the indictment is *constitutionally* barred. Moreover, the holding in *Jorn* is plainly consistent with the definition of an acquittal in the sense here relevant. The district court's declaration of mistrial in *Jorn* had not entailed "a legal determination" that the "facts adduced at the trial relating to the general issue of the case" were insufficient to establish the defendant's guilt, and accordingly it was held

that the order declaring the mistrial was not an "acquittal."

We do not believe it can be suggested, in light of the context from which the definition of an acquittal in *Sisson* was taken, that the Court in *Jorn* meant to imply that any order setting aside a judgment of conviction is an acquittal (for the purpose of the Double Jeopardy Clause) if the district court relied on evidence heard at the trial, even though the district court may be satisfied that the evidence is sufficient to sustain conviction. Indeed, if this were the import of the holding in *Jorn*, then every time a district court judge set aside a judgment of conviction and ordered a new trial in the interest of justice because of an error that may have been made at trial, *i.e.*, an erroneous charge or admission of evidence, or because of newly discovered evidence, such an order setting aside the verdict of conviction would be an "acquittal" simply because the district court may have considered evidence it heard at the trial.[19] The Court in *Jorn* could hardly have intended such a result.

[19] Of course, such an order is not different in any material way from an order of the court of appeals reversing a judgment of conviction and ordering a retrial. And the same considerations of policy that permit a retrial after such a reversal (see *United States* v. *Tateo*, 377 U.S. 463, 466), plainly permit a retrial where the district court acts prior to an appeal. Similarly, here, the order of the district court, entered after a judgment of conviction, was not different in any material way from an order of the court of appeals reversing a conviction because of unnecessary delay in prosecution, and since further appellate review may be sought from such an order, there would seem to be no rational justification for a holding that an appeal from the order of the district court is barred by the Double Jeopardy Clause.

In sum, it is submitted that, in the sense here relevant, the order of the district court was not an "acquittal" under the clear holdings of this Court.[20] Moreover, as we now show, our reading of these holdings—including that of *United States* v. *Sisson*—is supported by every court of appeals decision that has considered the issue other than that in the instant case.

[20] *Fong Foo* v. *United States*, 369 U.S. 141, is another case in which a termination of the trial in favor of the defendants by the district court, labeled an "acquittal" by that court and so treated by this Court, was held to be unreviewable. Arguably, *Fong Foo* is a case that, by treating the trial court's termination of the trial shortly after commencement of the prosecution's case as an acquittal, strays somewhat from the concept of acquittal as it has otherwise been recognized. However, the judgment of "acquittal" was based at least in part on the district court's determination that the witnesses were not testifying truthfully, and its view that, apparently, a conviction could not be obtained in light of their testimony because the proof of guilt would necessarily be insufficient (see concurring opinion of Harlan, J., 369 U.S. at 143–144; *Fong Foo* record, No. 64, Oct. Term 1961, at 364, 377, 573–574).

While the result in *Fong Foo* is consistent with our position here, we do not agree with the opinion's rationale placing controlling significance upon the label the district court attached to its preverdict order. The Court's opinion clearly indicated that, had the district court said it was declaring a mistrial rather than entering a judgment of acquittal, a retrial would have been permitted. It distinguished *Gori* v. *United States*, 367 U.S. 364, which involved a mistrial, on the ground that "[t]he trial [in *Fong Foo*] did not terminate prior to the entry of judgment * * *. It terminated with the entry of a final judgment of acquittal * * *." (369 U.S. at 143).

The clear import of this reasoning is that by labeling his order an "acquittal", even if there is no authority to enter such an order and it is not based on the sufficiency of the evidence, a district judge can insulate his action from further review. This reasoning has been explicitly rejected in *United States* v.

(Continued)

C. THE CONSISTENT APPLICATION OF THE *SISSON* DEFINITION OF ACQUITTAL IN THE COURTS OF APPEALS SHOWS THAT RESPONDENT WAS NOT ACQUITTED

Apart from the instant case, the courts of appeals have without exception construed the definition of "acquittal" stated in *Sisson* to mean a determination that the evidence at trial was insufficient to establish the defendant's guilt beyond a reasonable doubt. This definition has not only been applied to orders setting aside guilty verdicts returned by the trier of fact, but to pretrial orders in those circuits that have held that an acquittal may not be appealed even where jeopardy has not attached.

1. Post-trial orders

Perhaps the leading post-trial-order case permitting appellate review of an order dismissing an indictment is *United States* v. *Weinstein, supra*, 452 F. 2d 704, certiorari denied *sub nom. Granberger* v. *United*

(Continued)

Sisson, supra, 399 U.S. at 279 n. 7; the appropriate inquiry is whether, under the principles governing the permissibility of retrials after a trial has been terminated prior to verdict, the defendant may be subjected to a second trial (if that is the remedy sought on appeal). Compare *United States* v. *Jorn*, 400 U.S. at 478 (plurality opinion), with *Illinois* v. *Somerville*, 410 U.S. 458.

Moreover, if labels are controlling, then *Fong Foo* would not justify dismissal of the appeal here, since the district court did not enter a judgment which it denominated an "acquittal." Of course, *Fong Foo* is also distinguishable from this case because there, as this Court observed, "the Court of Appeals set aside the judgment of acquittal and directed that the petitioners be tried again for the same offense" (369 U.S. at 143). As we stated at the outset, no such relief is requested here.

States, 406 U.S. 917. There, the district court entered a post-conviction order dismissing an indictment in the "interests of justice." Even thought the dismissal had been based on evidence heard at the trial that related to the general issue in the case, the court of appeals held that "[t]he issuance of the writ [of mandamus] in this proceeding will not subject [the defendant] to retrial in violation of his right to be protected against double jeopardy" (452 F. 2d at 712–713). Rejecting the claim that *Sisson* required that the order of the district court be treated as an acquittal, Chief Judge Friendly stated for the court (*id.* at 714; emphasis added):[21]

> [D]efendant's reliance on the *Sisson* holding that an appellate court will look at what a district court did rather than at what it said it was doing, 399 U.S. at 270, 90 S. Ct. 2117, 26 L.Ed. 2d 608, is misplaced. What the judge did in *Sisson* was entirely plain. He refused to enter judgment on a verdict because, in his view, the Constitution prohibited him from doing so. *This was, in truth and fact, a judgment of acquittal; the judge believed that, with the evidence taken in the light most favorable to the Government, it still would not support a conviction.* The Supreme Court held that *such a judgment of acquittal* could not be transformed into the rather technical concept of an arrest of judgment, to wit, "the act of a trial judge refusing to enter judgment on the verdict because of an

[21] See also *United States* v. *Dooling*, 406 F. 2d 192 (C.A. 2), certiorari denied *sub nom. Persico* v. *United States*, 395 U.S. 911.

> error appearing on the face of the record," 399 U.S. at 280, 90 S. Ct. at 2125, simply by his calling it such. It would be a far cry from this to hold that the order here in question was a judgment of acquittal, which the judge repeatedly said he did not intend to enter, could not rightly have entered and, in all probability, had lost the power to enter.

Similarly, in *United States* v. *Whitted*, 454 F. 2d 642, the Court of Appeals for the Eighth Circuit entertained jurisdiction of an appeal in circumstances virtually identical to the instant case. There the district court, based in part on evidence heard at the trial (see 454 F. 2d at 643), had dismissed the indictment on the ground that it could not be sure whether the indictment against the defendant was returned on the basis of the evidence before the grand jury or on the basis of possible bias and prejudice against him (such a motion had been rejected prior to trial). Relying upon *United States* v. *Weinstein*, *supra*, and *United States* v. *Dooling*, *supra*, the court of appeals reversed the order dismissing the indictment. Moreover, it stated that on remand "[a] judgment of acquittal would be appropriate only if the evidence at trial had been insufficient to sustain Whitted's conviction" (454 F. 2d at 646).[22]

In *United States* v. *Jenkins*, *supra*, 490 F. 2d 868, certiorari granted May 28, 1974 (No. 73-1513), the Second Circuit applied the same standard. While it

[22] See also *United States* v. *McDaniel*, 482 F. 2d 305 (C.A. 8).

was there held that the order dismissing an indictment after a non-jury trial was an acquittal, the question was determined by the criteria we urge here. Judge Friendly, writing for the court of appeals in *Jenkins*, observed (490 F. 2d at 880): "*Sisson* held that when a guilty verdict has been nullified by a judge's decision to acquit *on the merits*, the Double Jeopardy clause prevented an appellate court from directing the entry of a judgment of conviction" (emphasis supplied).[23] See also *United States* v. *McFadden*, 462 F. 2d 484, 486 (C.A. 9), which cites *Sisson* in holding that when a post-trial order "goes to the general issue" it "must be held to be a judgment of acquittal."

In sum, except for the holding below, the courts of appeals have construed *Sisson* to define an acquittal as a post-trial order "entered on the ground that the Government did not present evidence sufficient to prove [an essential element of the offense]" (399 U.S. at 299). They reject implicitly the proposition, adopted below, that an "acquittal" results from the mere fact that the district court relies on evidence heard at the trial in setting aside an indictment (after con-

[23] Jenkins was charged with knowingly failing to report for induction as ordered. The district court dismissed the indictment after trial on the ground that Jenkins was not legally bound to obey the order because the local board had refused erroneously to reopen his classification to consider a post-induction-order claim for treatment as a conscientious objector. Like *Sisson*, and unlike this case and *United States* v. *Weinstein*, *supra*, the district court in *Jenkins* held—in effect—that the evidence was insufficient to warrant a conviction.

viction) on grounds that do not relate to the sufficiency of the evidence.

2. Pretrial orders

A number of courts of appeals have held that an appeal from a judgment of acquittal is barred by the Double Jeopardy Clause even if the judgment was entered before any trial has begun. While we believe that these decisions have erroneously applied the bar of the Double Jeopardy Clause to pre-jeopardy orders terminating a criminal case,[24] the definition of acquittal employed in those cases is otherwise consistent with our reading of *Sisson*. Thus, even those courts of appeals that have held that an appeal may not be taken from a pretrial acquittal have entertained appeals from pretrial orders terminating prosecutions for unreasonable delay.

For example, while the Court of Appeals for the Seventh Circuit has held (relying on *Sisson*) that a pretrial dismissal "on the merits" was an acquittal from which an appeal is barred by the Double Jeopardy Clause (*United States* v. *Pinto*, 454 F. 2d 657, 663–664), this principle was deemed "inapplicable" to a pretrial order terminating a prosecution because of unnecessary pre-indictment delay, clearly implying that the order was found not to be an acquittal. *United States* v. *Clay*, 481 F. 2d 133, 137 n. 11 (C.A. 7). Similarly, while the Court of Appeals for the Fifth Circuit has held that "[t]he present law of double jeopardy precludes retrial [and an appeal]

[24] See our brief in *Serfass* v. *United States*, No. 73-1424.

when the district court has ruled in favor of the defendant on facts going to the merits of the case if these facts were adduced at an evidentiary hearing" (*United States* v. *Lewis*, 492 F. 2d 126, 127), it stated in *United States* v. *Miller*, 491 F. 2d 638, 641 n. 1, that "an appeal from the dismissal of an indictment because of pre-indictment delay was not barred by double jeopardy."

Again, while the Court of Appeals for the Sixth Circuit has held that if an "indictment is dismissed as a result of a stipulated fact or the showing of evidentiary facts outside the indictment, which facts would constitute a defense on the *merits* at trial * * *, [it] operate[s] as an acquittal" for purposes of determining appealability (*United States* v. *Rothfelder*, 474 F. 2d 606, certiorari denied, 413 U.S. 922; emphasis supplied), it has likewise entertained appeals from pretrial orders terminating prosecutions for unnecessary delay or on other grounds not relating to the defendant's guilt or innocence. *United States* v. *Giacalone*, 477 F. 2d 1273; *United States* v. *Leininger*, 494 F. 2d 340.[25]

All of these cases demonstrate adherence to the traditional definition of an acquittal as a termination of the prosecution in favor of a defendant "on the merits" of the charge, that is, 'hat the evidence is

[25] Compare, also, *United States* v. *Hill*, 473 F. 2d 759 (C.A. 9), with *United States* v. *Richter*, 488 F. 2d 170 (C.A. 9); *United States* v. *Velazquez*, 490 F. 2d 29 (C.A. 2), petition for a writ of certiorari pending (No. 73-6493), with *United States* v. *Crutch*, 461 F. 2d 1200 (C.A. 2).

insufficient to sustain a conviction. There is no reason in law or policy to depart from that definition here.

CONCLUSION

The judgment of the court of appeals should be reversed and the cause remanded for determination of the merits of the appeal from the order of the district court.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1395.

UNITED STATES OF AMERICA,
Petitioner,

v.

GEORGE J. WILSON, JR.

BRIEF FOR THE RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1395.

UNITED STATES OF AMERICA,
Petitioner,

v.

GEORGE J. WILSON, JR.

BRIEF FOR THE RESPONDENT.

Philip D. Lauer, Esquire, counsel appearing on behalf of the Respondent, George J. Wilson, Jr., hereby presents Respondent's Brief on the merits of the issues presented by the United States of America as Petitioner in its Brief.

Respondent relies on the statements of the Petitioner with respect to the opinions below, jurisdiction, questions presented, constitutional provision and statue involved, and statements of facts.

SUMMARY OF ARGUMENT.

The Criminal Appeals Act, 18 U. S. C. 3731, provides for an appeal by the United States to the Court of Appeals "from a decision, judgment, or order of a District Court dismissing an indictment . . . except that no appeal should lie where the Double Jeopardy Clause of the United States Constitution prohibits further prosecution." We are not here concerned with principles of statutory construction, but rather with a determination as to the circumstances under which the Double Jeopardy Clause so "prohibits further prosecution" that a Government appeal is improper.

The District Court in this matter, after presiding over a trial resulting in a jury verdict of guilty, entered a post-trial order dismissing the indictment on the basis of unreasonable and prejudicial pre-indictment prosecutorial delay. The opinion of the Judge specifically referred to testimony heard at trial, and the trial testimony was clearly relevant to the general issue of the case.

Petitioner contends that the matter appealed is purely an error of law and, as such, would not result in a retrial if appellate relief were granted. From this, Petitioner concludes that the Double Jeopardy Clause is not implicated, since Petitioner reads that clause as prohibiting only second trials. It should be noted that, in arguing this matter, Respondent has responded directly to the contentions contained in Petitioner's brief in *United States v. Jenkins*, No. 73-1513, which brief was incorporated by reference in Petitioner's brief.

The ruling of the Court below cannot be neatly characterized as a purely legal ruling, which can be reviewed and, presumably, changed without implicating the Double Jeopardy Clause.

In making this determination, one must consider the historical background of the Double Jeopardy Clause, and it appears that the basic principles are among the oldest and best known in this and other systems of jurisprudence. Tracing history, while informative, does not clearly dispose of the question presented. However, any doubt has been resolved by the decisions of this Court, and the compelling reasoning of those decisions.

In reviewing those decisions, it is apparent that, since *United States v. Sanges*, 144 U. S. 310 (1892), the first case directly concerned with Government appeals in criminal cases, through the present time, this Court has jealously protected criminal defendants from appeals following verdicts of acquittal. The distinction sought by Petitioner, which would exclude from the operation of this principle all cases in which the Judge's decision may be classified as legal and reversible without necessity of retrial, finds no support in any of these cases.

The development of the common law of this country has proceeded to the point described in *United States v. Sisson*, 399 U. S. 267. Although that case was decided under the old Criminal Appeals Act, it was also decided on double jeopardy grounds, equally applicable under the new Act. As noted herein, that portion of the opinion dealing with the double jeopardy question was the only portion of the opinion on which the Court clearly stood together.

The general acceptance of the non-appealability of an acquittal is demonstrated by numerous other decisions of the Courts of Appeals.

The Petitioner next contends that the order terminating the prosecution in this case was not an acquittal. Once again, tracing both the common law and the decisions of this Court, it is apparent that the order entered in this

matter was the functional equivalent of an acquittal. Further, it meets the specific tests established by *United States v. Sisson, supra,* for discerning acquittals. There is no reason for a change in that test, and it is submitted herein that the judgment of the Court below was an acquittal, and therefore not appealable.

ARGUMENT.

I. The Double Jeopardy Clause Bars an Appeal From a Judgment of Aquittal Entered Notwithstanding a Jury Verdict of Guilty, Even When a Successful Appeal Would Not Result in a Retrail, But in the Entry of a Judgment of Conviction and Sentence Thereon.

This case submits for the consideration of your Honorable Court an extremely important issue dealing with the meaning of the Double Jeopardy Clause of the United States Constitution and the statutory construction of the recently amended Criminal Appeals Act, 18 U. S. C., Section 3731. It is submitted that the allowance of an appeal by Petitioner from the order of the District Judge will place the Respondent twice in jeopardy in violation of the clear import of the Criminal Appeals Act and the United States Constitution.

It is admitted that the amendment to the Criminal Appeals Act accomplished by the Omnibus Crime Control and Safe Streets Act of 1970 was brought about in order to permit appeals in a broader variety of cases. The Government was not, however, given an unfettered right to appeal, but was given the right to appeal "from a decision, judgment, or order of a District Court dismissing an indictment . . . except that no appeal shall lie where the Double Jeopardy Clause . . . prohibits further prosecution." Thus it must be determined, in each case, whether the effect of the appeal would be to violate the Double Jeopardy Clause.

While reserving the right to argue that the Double Jeopardy Clause does not bar every appeal which would require a retrial if successful, the fundamental position taken by Petitioner is that a purely legal error, made by a

District Court in entering an order equivalent to an acquittal, may be reviewed without violating the Double Jeopardy Clause. The argument turns on two related legal conclusions: That the matter appealed is purely an error of law, and, as such, will not result in a retrial if appellate relief is granted. It is submitted that such conclusions cannot be applied to the case at bar, and, even if applicable, the prohibitions of the Double Jeopardy Clause cannot be avoided.

1. In its brief in *United States v. Jenkins*, No. 73-1513, upon which Petitioner relies in its argument on this issue, Petitioner characterizes the decision from which the appeal was taken as a purely legal ruling. Such characterization is clearly justified in that case, since the order entered by the District Judge, sitting without a Jury, was accompanied by specific findings of fact and conclusions of law. The decision in *Jenkins* is clearly *not* one "in which the result turned on credibility or demeanor or assessing a mental attitude . . . the facts relevant to the legal ruling were wholly objective and impersonal." (Br. 12).

Although a determination that it only seeks to attack an erroneous legal ruling is important to the Petitioner's argument, such a finding in the instant case would ignore the character of the opinion of the District Judge. After reviewing the criteria of *United States v. Marion*, 404 U. S. 307, regarding the circumstances under which an indictment may be dismissed for prejudicial, pre-indictment prosecutorial delay, the Court concluded that Respondent had been prejudiced by such delay, and thus deprived of a fair trial. In so concluding, the District Judge took

> "notice of the facts brought out in the testimony of the case concerning the potential testimony of Mr. Schaefer (Pet. App. D, 14a-15a): Mr. Wilson, the Defendant, stated (40-41 of the Notes of Testimony of the pre-trial hearing held on March 14, 1972) that the signing of all union checks was in the hands of Mr. Brinker and Mr. Schaefer. During the trial (N. T. 133-134) the Defendant indicated that he never involved himself with bookkeeping or the internal affairs of the office. Finally, Mr. Wilson stated that he ordered no one to write the check in question (N. T. 164-165).
>
> On the Government's side, it was established that the bill from the wedding reception was sent to the Defendant's home address and not to the union (N. T. 62). Also, Mrs. Jean Sippel, the office secretary for the I. B. E. W. and the individual who prepared the checks for the signature of Mr. Brinker and Mr. Schaefer stated that at no time had a check prepared by her been sent back without being signed. Other testimony established that Mr. Wilson controlled the union (N. T. 17), and that Mr. Schaefer and Mr. Brinker were office help who owed their job to the Defendant (N. T. 80, 181)."

The District Court concluded (Pet. App. D 15a):

> "The unreasonable delay was substantially prejudicial to the case of Mr. Wilson in that the only witness who could explain the circumstances of the check became terminally ill during the period of unreasonable delay. Although the Government contends that this is only a showing of potential or speculative prejudice, there is an absolute certainty as a signer of all checks that Mr. Schaefer would add testimony of utmost importance to the trial. Because of the unreasonable delay, substantial prejudice resulted which violated the Defendant's due process rights under the Fifth Amendment."

Admittedly the decision of the District Court was *legal* insofar as it concluded, on the basis of applicable law, that the Petitioner had unreasonably delayed in presenting the indictment, and that the Respondent had been prejudiced thereby. However, the decision is clearly not *purely* legal since the legal conclusions are predicated upon factual determinations resolved in favor of the Respondent.

In particular, the facts adduced at both the pre-trial hearing and trial were certainly not without dispute. The Government's testimony would apparently contend that the investigation was not complete as of the date upon which the Trial Court said it was complete, since the FBI agent testified that the matter was thereafter referred to various governmental agencies for consideration. Respondent testified that he had no knowledge of the payment of the check at the time of its payment, but the Government presented testimony to establish that bills had been sent to Respondent's home. It was the clear import of the testimony of Jean Sippel that Messrs. Schaefer and Brinker were merely rubber stamp union officials, whereas the testimony of other Government witnesses, and the Respondent, demonstrated that these persons had complete responsibility in the area of the payment of bills.

It is submitted that the ruling of the District Judge constituted a resolution of mixed questions of law and fact. An appeal by Petitioner must, of necessity, question the legal conclusion *and* the factual determinations supporting those conclusions.

2. Petitioner next contends that, although the Trial Judge's ruling has been labeled an "acquittal", its legal component may still be reviewed separately and distinctly from the findings of fact, leaving one untouched and challenging the other. For the reasons set forth above, this necessary dissection cannot so readily be accomplished here.

3. The question of whether a successful appeal by Petitioner will require a retrial is likewise more complex in this matter than in *Jenkins*. However, it is conceded that, upon a reversal of the order of the District Judge, the judgment of conviction would be entered without a second *trial*, unless some subsequent action on Respondent's other post-trial motions would so require.

4. The balance of the Petitioner's brief with respect to this issue, and the responses herein contained, examines the background of the Double Jeopardy Clause, decisions of this Court dealing with double jeopardy, and attempts at analogizing the issues submitted to other situations held not to implicate the Double Jeopardy Clause. As will be shown herein, the rule urged upon this Court by Petitioner results from the narrowest possible reading of the historical background in subsequent cases dealing with the Double Jeopardy Clause. The order of the District Judge, if it constitutes an acquittal, terminated the jeopardy of Respondent; to now require him to suffer a reversal of that status, and resumption of jeopardy, constitutes putting him, for a second time, "in jeopardy", whether or not a retrial will result.

II. Historical Background of the Double Jeopardy Clause.

1. The scholarly attempts of Appellate Judges and brief writers, in this and related cases, to track the history of the protection against double jeopardy reveal substantial agreement that the concept is, at least, extremely old and firmly rooted in the jurisprudence of most legal systems. As stated by Justice Black, the "(f) ear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization." *Bartkus v. Illinois*, 359 U. S. 121, 151 (1959) (Black, J., dissenting). As also noted by Justice Black, the idea of limiting the exposure of a Defendant to one trial and one punish-

ment survived even the Dark Ages through the Canon Law and other christian writings. *Bartkus v. Illinois,* 359 U. S. 121, 152, n. 4 (1959) (Black, J., dissenting). In fact, the avoidance of a second punishment was at the heart of the dispute between Thomas Becket and King Henry II. 1 Pollock and Maitland, A History of English Law 448-49 (2d ed. 1899). It has become so fundamental as to be characterized as one of the universal principles of "reason, justice, and conscience, of which Cicero said: 'Nor is it one thing at Rome and another at Athens, one now and another in the future, but among all nations it is the same.' " Batchelder, Former Jeopardy, 17 Am. L. Rev. 735.

This concept has come to be considered so fundamental to the English common law as to be described as a "universal maxim of the common law." 2 Cooley's Blackstone (4th Ed. 1899), 335, 336. Ultimately, as indicated in Petitioner's brief in *Jenkins* (Br. 18, 19), this developing concept became embodied in the pleas of *auterfoits acquit* and *auterfoits convict.* 4 Blackstones Commentaries, Ch. XXVI, p. 335 (Tucker ed.); IV Hawkins, Pleas Of The Crown 312 (1795 ed.). These common law pleas had as their objective the absolute bar of a second trial. 2 Hawkins, Pleas Of The Crown 515-29 (8th ed. 1824). In fact, the policy became so strong that upon conviction for a felony there could be no writ of error and request for new trial by the Defendant. Myers and Yarborough, *Bix Vexari: New Trials and Successive Prosecutions,* 74 Harv. L. Rev. 1, 4 (1960). Indeed, the original draft of the Fifth Amendment as submitted to the House of Representatives contained a protection for the Defendant from "more than one punishment or one trial for the same offense . . ." 1 Annals of Congress, 434 (1789-1791). The debate which followed indicated the fear of the members of that body that that language might permit the English rule to become the law of the United States. *Id.* at 753.

The specific question of the appealability of an acquittal is fully explored in the majority opinion of the Court of Appeals in *Jenkins* (*Jenkins,* Pet. App. A, pp. 12a-14a). This much is clear: There is ample evidence to suggest that the draftsmen of the Bill of Rights intended to include in the protection guaranteed therein the common law protections as they existed at that time. It is certainly reasonable to conclude that the framers intended to include the inability of the sovereign to appeal an acquittal after a trial on the merits. However, as suggested in the opinion below in *Jenkins,* any doubt is resolved by the decisions of this Court since the adoption of the Bill of Rights.

It is important to note at this point that such an analysis of the Double Jeopardy Clause, while instructive as to the reasons for the existence of such protection and, to a lesser extent, to the content of same, the specific problem submitted in Petitioner's brief was not known to the common law at that time, and must be governed by the development of the case law in this country since that time. The insistence of the Petitioner that the Double Jeopardy Clause and its antecedents can only be read to protect against a second *trial* is supportable by the common law by reason of its limited development at the time of the adoption of the Bill of Rights. However, the application of those common law principles in the case law of this Court dictates, we submit, a result contrary to that proposed by Petitioner.

III. The Decisions of This Court Bar an Appeal From an Acquittal Where a New Trial Is Not Sought.

(A) The Cases Relied Upon by the Court of Appeals in *United States v. Jenkins,* No. 73-1513, Are Controlling.

In Petitioner's brief in *Jenkins,* upon which Petitioner relies with regard to these issues, Petitioner contends that

the cases relied upon by the Court of Appeals do not bar an appeal in the issue presented. With this contention we disagree. To so hold would be to overlook the clearest of intentions and statements as expressed by this Court in those opinions.

1. *United States v. Ball, 163 U. S. 662.*

Prior to considering this case, one must look to its antecedents. The Supreme Court first considered government appeals in criminal cases in 1892 in *United States v. Sanges*, 144 U. S. 310 (1892). In that case, the Government sued out a writ of error upon a judgment for Defendants sustaining their demurrer to the indictment. In dismissing the writ, this Court held that:

> ". . . under the common law, as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the state, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law. In either case, the defendant, having been once put upon his trial and discharged by the court, is not to be again vexed for the same cause, unless the legislature, acting within its constitutional authority, has made express provisions for a review of the judgment at the instance of the government." 144 U. S. at 312.

In so holding, this Court reviewed with approval numerous state court decisions refusing to allow the Government to seek review of a judgment in favor of a defendant, whether that judgment was entered by way of acquittal or on a question of law. Although several state

courts had done so on the basis of the Double Jeopardy Clause of the Fifth Amendment, most such decisions were founded more broadly on the developing common law of the United States. Indeed, several pages of the opinion are devoted to reviewing such decisions, and the common law of this country at that time seems overwhelmingly to have precluded Government *appeals* in such cases, and not just retrials. Although the Double Jeopardy Clause was not specifically cited as compelling this holding, the reasoning behind this principle appears to have pervaded the common law of this country and influenced this decision in particular.

It is in this context, then, that *U. S. v. Ball, supra*, was decided. As noted in the Petitioner's brief in *Jenkins* (Br., 27-29), this Court specifically held that a general jury verdict of acquittal could be invoked as a bar to a subsequent prosecution for the same offense, regardless of whether judgment had been entered on the acquittal. However, given the status of American common law at that time, the dictum applicable to this case cannot be dismissed so readily as the Petitioner would urge. In this regard, the Court stated (163 U. S. at 671):

> "As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, *and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution.* However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense. *United States v. Sanges*, 144 U. S. 310; *Commonwealth v. Tuck*, 20 Pick. 356, 365; *West v. State*, 2 Zabriskie, (22 N. J. Law,) 212, 231; 1 Lead. Crim. Cas. 532."

Although dictum, the italicized portion of this quote clearly and accurately states the common law and, perhaps prophetically, begins to reveal the narrowness of Petitioner's position. Rather than being merely the gratuitous and presumably accidental dictum pictured by Petitioner, this language recognizes the status of the current common law and the fundamental meaning of the Double Jeopardy Clause.

2. *Kepner v. United States, 195 U. S. 100.*

Kepner was acquitted by a Trial Judge in the Philippines of a charge of embezzlement. The Government appealed to the Supreme Court of the Philippines, which reversed, found the Defendant guilty, and sentenced him. In its review, the Court was directly confronted with the question of whether a provision of an act of Congress, embodying the Double Jeopardy Clause, prevented an appeal by the Government.

In holding that the Double Jeopardy Clause prevented the appeal, the Court treated the statutory provisions as identical in effect to the Fifth Amendment. Although, as noted in Petitioner's brief in *Jenkins* (Br. 30), this Court has admonished that such language is dictum and not conclusive, *Green v. United States,* 355 U. S. 184, 197, n. 16, the reasoning of this Court in applying these principles cannot be abandoned.

Quoting with approval and at length from *United States v. Ball, supra,* this Court refused to allow the appeal:

> "The *Ball* case, 163 U. S., *supra,* establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the Government. The Court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense * * *."

Apparently since the review by the Philippines appellate court would consist of a *de novo* consideration of the entire matter, the Petitioner concludes that this case does no more than preclude a retrial. However, as stated in the opinion of the Court of Appeals in *Jenkins, supra* (*Jenkins,* Pet. App. A. p. 29a), "(s)ince under Philippine practice no further proceedings were required below, the decision belies any view that the Double Jeopardy Clause protects only against the vexation of a second trial." Jeopardy having attached and terminated, *appellate review* is seen as placing Defendant twice in jeopardy. The fact that such review consisted, under Philippine practice, of a de novo consideration, although supportive of the results reached, was not, and cannot be viewed to be, the sole basis for same.

3. *Fong Foo v. United States, 369 U. S. 141.*

The factual background for this case is adequately treated in Petitioner's Brief in *Jenkins* (Br., 31). It is admitted that this case is distinguishable from the case at bar, since the District Judge's decision in that case could not be corrected without a second trial. However, it is worthy of note, and was noted by the Court of Appeals in *Jenkins,* for several compelling reasons.

First, the decision barred a retrial because of the entry of a directed acquittal, even where the judgment was clearly entered on the basis of an error of law. This is difficult to square with Petitioner's argument that it should be allowed to correct purely legal errors by appeal, except for

the added fact that no retrial will be required in the instant case.

Surely, the result cannot turn on the timing of the trial judge in entering his erroneous ruling. It is apparently the Petitioner's position that, had Judge Davis entered his ruling (the equivalent of an acquittal) at any point prior in time to the jury verdict, it would be barred from seeking review. Can Respondent be said to stand in greater jeopardy where no verdict was entered, as in *Fong Foo?* Clearly not. The Double jeopardy clause is not a simple, mechanical device to prevent only retrials in such cases.

> "In *United States v. Ball*, 163 U. S. 662, 669 (1896), this Court observed:
>
> "The Constitution of the United States, in the Fifth Amendment, declares, 'Nor shall any person be subject (for the same offense) to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice *put* in jeopardy . . ." (Emphasis added.) The "twice put in jeopardy" language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the "same offense" for which he was initially tried." *Price v. Georgia*, 398 U. S. 323, 326 (1970).

Although this construction is most clearly applicable to cases in which the appeal will require a new trial, it cannot be said to be limited to such cases. In fact, the concept has equal application in this case, where the allowance of the appeal will clearly expose Respondent to entry of judgment of conviction in a case on which he has been tried and, in effect, acquitted.

4. *United States v. Sisson, 399 U. S. 267.*

In this case, the Defendant had been charged with a violation of 50 U. S. C. App. Section 464(a) by failing to obey an order to submit to induction. Certain pre-trial motions were made and dismissed, and the District Court held a trial before a Jury which resulted in a verdict of guilty. The Defendant moved to arrest the judgment, F. R. Cr. P. 34, alleging essentially that the Court lacked jurisdiction because of the illegality of the Viet Nam war. Avoiding this claim altogether, the District Judge entered an order allegedly arresting judgment on the grounds that the District Judge was satisfied that the Defendant had genuine and sincere oral objections to combat service in Viet Nam, further holding that to compel him to render such service would violate the Free Exercise provisions of the First Amendment and the Due Process Clause of the Fifth Amendment.

First let us note that there are certain rather obvious parallels between the *Sisson* case and the case at bar. In both cases, pre-trial motions for dismissal had been dismissed; juries had been empaneled and the case tried to verdict; verdicts of guilty were rendered in both cases; the Trial Court in both cases entered an order, in response to post-trial motions, terminating the prosecution; the post-trial orders in both cases were founded, at least in part, upon evidence adduced at the time of trial.

It is likewise clear that there are certain fundamental differences between the *Sisson* case and the one at bar. In the *Sisson* case, the Court concluded, in part, that an appeal would not be permitted because the language of Section 3731 of the Criminal Appeals Act did not, at that time, allow for such appeals. Since the Criminal Appeals Act has been amended, and some of these restrictions removed, we are confronted with a fundamentally different statute.

However, the opinion goes further, and it is respectfully submitted that the additional language of the opinion was not, as characterized in Petitioner's *Jenkins* brief, "without apparent reason" (Br. 34). Rather, as noted in the opinion of the Court below in *Jenkins*, the additional language in the opinion, to which reference is made below, was the only portion of the opinion in which Justice Harlan wrote for a clear majority.

The relevant language set forth hereinafter makes clear that the Court considered, and relied upon, the Double Jeopardy Clause in reaching its decision, and did not simply conclude the non-appealability of the District Court's ruling on the basis of the absence of a specific statutory authority. Justice Harlan said (399 U. S. at 288-90):

> "The same reason underlying our decision that this was not a decision arresting judgment—i.e., that the disposition is bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial—convinces us that the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty."

Justice Harlan then stated a hypothetical case, similar in factual content to the facts in *Sisson*, except that, in the hypothetical, the trial judge instructed the jury to acquit the Defendant if it made the same factual findings which the Court had made in reaching its post-trial opinion. Justice Harlan concluded that, if the jury had thereafter acquitted, there could be "no doubt that its verdict of acquittal could not be appealed under Section 3731 *no matter how erroneous the Constitutional theory underlying the instructions.*" 399 U. S. at 289 (emphasis in original).

If any doubt remained as to whether the opinion dealt solely with the construction of the Criminal Appeals Act,

it was resolved when Justice Harlan stated (399 U. S. at 289):

> "Quite apart from the statute, it is, of course, well settled that an acquittal can 'not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution. . . . In this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense,'" United States v. Ball, 163 U. S. 662, 671 (1896).

As noted in the opinion of the Court of Appeals (*Jenkins* Pet. App. A, p. 24a), the "passage quited from *Ball* was the very one that Mr. Justice Day had cited in Kepner for the proposition that the Double Jeopardy Clause prohibited an appeal by the Government after acquittal in a criminal case, and that the Court had again relied on in *Fong Foo.*"

It is important to note that this Court, in *Sisson*, was also confronted with a situation in which, if the appeal were successful, no retrial would result. As stated by Mr. Justice White in dissent, a reversal on the basis that the trial judge's legal theory was incorrect would have meant that "the jury's verdict of guilty—with judgment no longer 'arrested'—simply remains in effect." 399 U. S. at 329. The situation was totally analogous to the one here submitted, and was resolved against the allowance of an appeal.

It appears that the issue here submitted, viz., that the Amended Criminal Appeals Act entitles the Government to appeal every acquittal which can be demonstrated to be the result of an error of law, has been rejected by this court in *Sisson*.

As will be noted below, this Court in *Sisson* also dealt at length with the question of whether the action of the

District Judge constituted an acquittal. It is submitted that the Court's action in this case constituted an acquittal.

5. *Price v. Georgia, 398 U. S. 323.*

Although this case is not considered in either the brief or opinion below in *U. S. v. Jenkins,* it has been considered by the Court of Appeals in this case, and will be discussed briefly herein.

In this case, in an opinion rendered during the same month as that in *United States v. Sisson, supra,* this Court held, in part, that a retrial of a criminal defendant, after that defendant had obtained a reversal of his prior conviction, was permissible and did not implicate the Double Jeopardy Clause. However, the Court also held that, after an implicit acquittal on a charge of first degree murder at the second trial, and a conviction thereat of voluntary manslaughter, the defendant could not, after reversal of his conviction, again be tried on the greater offense, since the first verdict had constituted an acquittal on that greater offense.

Thus far, the decision is in complete accord with the law as understood and stated by both parties in these proceedings, and is not directly relevant to the issues submitted. However, what is relevant is the approval indicated by this Court of the language in *United States v. Ball* indicating that the "prohibition (against double jeopardy) is not against being twice punished, but against being twice *put* in jeopardy . . ." (emphasis added). *U. S. v. Ball,* 163 U. S. 662, 669. The Court then stated, in language extremely important to the issue presented, the following:

> "The 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried." 398 U. S. at 326.

Once again, although this Court was confronted with a question of the permissibility of a second trial, both the reasoning and language used in prohibiting such trial indicate that the Double Jeopardy Clause was not intended, and has not been applied, to simply prevent in any mechanical way second trials after first trials at which jeopardy has attached. Rather, as indicated above, the double jeopardy provisions of the Constitution relate to a host of situations which can result in an accused suffering the risk or potential of a conviction for an offense for which he was initially tried and either acquitted or convicted.

IV. Petitioner's Submission Is Not Supported by Decisions of This Court or Others in Analogous Situations.

In its brief in *United States v. Jenkins,* No. 73-1513, upon which Petitioner relies in this matter, Petitioner concludes that the case law dealing with the appealability of other types of post-jeopardy orders supports its submission in this case. In so doing, Petitioner submits that, because appeals are allowed from orders of courts of appeals reversing convictions and from orders of a district court arresting judgment, logic compels the allowance of an appeal from an order of the type entered by the District Judge in this case.

Petitioner first contends that it is the practice of this Court to review court of appeals decisions that reverse convictions in the District Court. Initially, it must be noted that there is some question as to whether the double jeopardy claim has even been raised in most such cases. In particular, in the cases cited in the Government's brief as supporting this proposition, there do not appear to have been, in the opinions or briefs of counsel, any discussions of potential double jeopardy claims. *United States v. Russell,* 411 U. S. 423; *United States v. Maze,* 414 U. S. 395;

United States v. McGrath, 412 U. S. 936; *United States v. Seeger*, 380 U. S. 163.

Further, although Petitioner correctly notes that this Court rejected one such double jeopardy claim in *Forman v. United States*, 361 U. S. 416, the double jeopardy claim in that case was rejected for a totally different reason. In that case, the Defendant had been convicted, and the Court of Appeals initially reversed the conviction and directed the District Court to enter judgment of acquittal. However, upon rehearing, the order of the Court of Appeals was modified, and an order was entered directing a new trial. In that decision, this Court held that when the Petitioner:

> ". . . opened up the case by appealing from his conviction, he subjected himself to the power of the appellate court to direct such 'appropriate' order as it thought 'justified under the circumstances.' Its original direction was subject to revision on rehearing. The original opinion was entirely interlocutory and no mandate was ever issued thereon. It never became final and was subject to further action on rehearing. . . . The petition on rehearing operates to suspend the finality of the . . . court's judgment, pending further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." (citations omitted). 361 U. S. at 427.

It is interesting to note that, although the Court rejected a double jeopardy claim in that case, it did so on the basis of a finding that no acquittal had ever effectively been entered. Further, it is submitted that the proper rule in such cases should be that an order of a Court of Appeals, directing a true verdict of acquittal, is not appealable. However, even assuming the appealability of such an order,

such orders are not truly analogous to orders of a District Judge accomplishing an acquittal or its equivalent. This is so because, in so doing, the District Judge is sitting as a true finder of facts. In particular, his decision, to the extent that it resolves factual issues, is a product of all of the occurrences during the taking of testimony. The District Judge has available to him not only the words of the witnesses, but their demeanor, appearance, and all other tests normally used by finders of fact in resolving factual issues. This is clearly not true in the case of a Court of Appeals, and it could well be argued that, if some distinction is to be made, a factual determination by the District Judge should be accorded greater authority. It can also clearly be argued that, where the verdict of guilty remains as the last word of the Trial Court, all proceedings in the Appellate Courts simply constitute review of that finding, and cannot be considered to have been reversed until the review process is complete. Such is not the case in this case, where the order of the District Court, despite a verdict of guilty, is one terminating the prosecution and, we contend, equivalent to a verdict of acquittal.

Petitioner further relies upon the opinion of Judge Learned Hand in *United States v. Zisblatt*, 172 F. 2d 740 (C. A. 2), appeal dismissed, 336 U. S. 934. However, in that case the Court of Appeals for the Second Circuit specifically did not hold that an appeal from a post-conviction order of the District Court dismissing an indictment under the Statute of Limitations was not barred by the Double Jeopardy Clause. Rather, that Court held that they had no jurisdiction to hear the appeal, and certified the case to the Supreme Court. Judge Learned Hand characterized the decision of the District Court as a judgment sustaining a "special plea in bar", and thus potentially appealable directly to the Supreme Court. Judge Hand also recognized a potential double jeopardy claim:

"However, . . . the motions, which he did entertain and eventually granted, were all made after the trial had begun and, therefore, after the defendant had—literally at any rate—'been put in jeopardy'. There is, therefore, a good argument for saying that no appeal lies to the Supreme Court." (172 F. 2d at 742).

Nor can Petitioner take comfort from *U. S. v. Weinstein*, 452 F. 2d 704, cert. denied, *sub nom. Grunberger v. U. S.*, 406 U. S. 917, upon which Petitioner also relies in its Brief in *Jenkins* (Br. 40). In that case, the Second Circuit Court of Appeals granted a petition by the Government for writ of mandamus to the trial Judge, directing him to vacate his post-verdict, post-conviction order dismissing the indictment. In so doing, the Court specifically found that there had been no acquittal, and did so using the principles enunciated in *U. S. v. Sisson*, 399 U. S. 267. The factual bases for such a finding were obvious: a judgment of conviction had been entered prior to the Judge's order; the Judge himself repeatedly refused to acquit the Defendant; the Judge stated his correct belief that he had no "right" to direct acquittal for the reasons stated. Looking "at what (the) District Court did rather than at what it said it was doing", *U. S. v. Sisson*, 399 U. S. at 270, the Court found that no acquittal had been accomplished and that no double jeopardy would ensue from its order.

Accordingly, it is respectfully submitted that there is no support for the issue submitted in any of these areas, and the appeal sought by Petitioner in this case should be barred.

V. Summary—Application of Double Jeopardy Clause.

In summary, the position urged by Petitioner constitutes an unworkable and constitutionally unacceptable approach to determining the appeal of an Order, and the application thereto of the Double Jeopardy Clause. We do serious harm to the fair administration of criminal justice if we so belabor the fair and obvious meaning of the concepts here in issue that they are no longer capable of predictable and reasonable application. Petitioner has presented numerous cases thus far in the Brief, all of which demonstrate that there is a reasonable Double Jeopardy standard, and that it is generally understood as precluding government appeals in cases such as the instant one.

We believe that Judge Friendly, in considering this issue in *U. S. v. Jenkins, supra,* said it best when, in discussing the *Sisson* opinion, he stated (490 F. 2d 878):

"These pages of the *Sisson* opinion seem to us to be dispositive of the instant case. In essence the judge's post-trial ruling in *Sisson* had made the jury trial a nullity and had resulted in a trial to the judge, who had rendered a judgment of acquittal on the merits. Even though this action was based on an erroneous legal ground, the Double Jeopardy clause prevented a new trial. Indeed, we have already interpreted *Fong Foo* and *Sisson* to mean precisely this. *United States v. Weinstein*, 452 F. 2d 704, 709 (2 Cir. 1971), *cert. denied*, 406 U. S. 917 (1972)."

Further, 490 F. 2d 879:

"The Government argues that a reversal here would not require Jenkins to undergo the burden of a second trial, since the judge would simply be directed to alter his erroneous conclusions, . . . and Jenkins' only vexation would lie in being convicted rather than acquitted. We are not certain the matter is quite that simple. . . . But apart from that, the absence of need for a second trial would not distinguish *Sisson*. As Mr. Justice White pointed out in dissent, a reversal

there on the basis that the trial judge's legal theory was incorrect would simply have meant that 'the jury's verdict of guilty—with judgment no longer "arrested"—simply remains in effect.' 399 U. S. at 329. Furthermore, although what we must decide is the case before us, the Government has sought a ruling limited to bench trials where an acquittal plea can be traced to a demonstrable error of law and no further evidentiary hearing is needed. It asserts that the amended Criminal Appeals Act entitles it to appeal every acquittal which can be demonstrated to be the result of an error of law by the judge. Boldly facing up to its problems, the Government contends that the Double Jeopardy clause should be read to permit a retrial even on an erroneous instruction, a position Justice Harlan rejected out-of-hand in *Sisson*, 399 U. S. at 289. We think that, so long as *Kepner* and *Sisson* stand, the clause forbids a retrial whenever the trier of the facts has rendered a legal determination of innocence 'on the basis of facts adduced at the trial relating to the general issue of the case.' 399 U. S. at 290 n. 19."

VI. An Order Terminating a Prosecution Because of Unnecessary Delay in Indictment Is an Acquittal Under the Facts in This Case.

The Petitioner next turns to its contention that the Order entered by the District Judge, terminating the prosecution on the ground of unnecessary pre-indictment delay, prejudicial to Respondent, did not constitute an acquittal. In so doing, Petitioner urges that, despite the fact that this determination was predicated upon evidence heard at trial and relevant to the general issue of guilt or innocence, the Order cannot be characterized as an unappealable "acquittal" for the purposes of the double jeopardy clause.

The reliance of Petitioner upon *U. S. v. Marion*, 404 U. S. 307, is inapposite. In that case, the District Court granted a pre-trial motion, dismissing the indictment on the ground of unreasonable delay, and finding substantial prejudice to the Defendant. This Court, in determining that the Order could be appealed, necessarily found that, since the Order had been entered pre-trial, and since the Order could not be considered as a determination relating to the guilt or innocence of the accused, such a determination would have to await the evidence presented at trial. This is a substantially different situation from the case at bar, where the Order followed the completion of trial testimony, and was substantially predicated on that testimony.

A. The Common Law Definition of an Acquittal.

It is conceded that the common law understanding of an acquittal contemplated a finding of "not guilty" on the general issue of guilt or innocence. In so conceding, however, it is to be noted that the common law precedents relied upon by Petitioner are devoid of any language which would preclude the definition of an acquittal urged by Respondent and applied most recently by this Court.

B. The Dismissal Was an Acquittal Under the Established Construction of the Double Jeopardy Clause as Enunciated by This Court.

Once again, Petitioner's discussion of this topic is replete with case references in which a consideration of the definition of acquittal did not require a resolution of the issue here submitted. For instance, in *United States v. Ball*, 163 U. S. 662, the Defendant had been acquitted by a jury verdict. It was this acquittal which barred his subsequent prosecution and trial. The Court was not called upon to define, and did not define, this concept. Similarly,

in *Kepner v. United States, supra*, although the Court held a verdict of acquittal to bar a subsequent prosecution, the Court did not attempt to define the meaning of the concept of "acquittal". It is true that, in applying this concept to these cases, the Court recognized an acquittal as involving the failure of the prosecution to submit convincing evidence establishing the existence of the elements of the offense. It cannot be concluded, however, from the authority presented by Petitioner, that the failure to consider factual settings such as the one presented somehow precludes a finding that the order in this case was an acquittal. To the contrary, the more recent decisions of this Court would seem to dictate that the order of the District Judge below was, in effect, an acquittal for double jeopardy purposes.

In the instant matter, the Court of Appeals, in concluding that the dismissal by the District Judge was an acquittal, relied upon this Court's statement of that concept in *United States v. Sisson, supra*, 399 U. S. 267, as adopted in *United States v. Jorn*, 400 U. S. 470, 478 n. 7:

> "[T]he trial judge's disposition is an 'acquittal' if it is 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case . . .'"

Petitioner concedes that it is true that the evidence on which the District Court relied in dismissing the indictment was "adduced at the trial" and that it related to the "general issue of the case." In so doing, however, Petitioner also contends that the same evidence was adduced at the pre-trial hearings, and that the fact that the evidence was related to the general issue of the case was wholly fortuitous.

With regard to the first contention, that the evidence was also adduced at the pre-trial hearings, it is respectfully submitted that the evidence presented at the trial was substantially greater in volume and effect than that presented at the pre-trial hearings, and that the testimony relied upon by the Court at trial was not simply a restatement of the pre-trial testimony. In the opinion below, the District Judge referred to the testimony as follows (Pet. App. D, p. 14A):

> "The Court takes notice of the facts brought out in the testimony of the case concerning the potential testimony of Mr. Schaefer. . . . During the trial (N. T. 133-134) the defendant indicated that he never involved himself with bookkeeping or the internal affairs of the office. Finally, Mr. Wilson stated that he ordered no one to write the check in question (N. T. 164-165).
>
> On the government's side, it was established that the bill from the wedding reception was sent to the defendant's home address and not to the union (N. T. 62). . . . Other testimony established that Mr. Wilson controlled the union (N. T. 17), and that Mr. Schaefer and Mr. Brinker were office help who owed their jobs to the defendant (N. T. 80, 181).
>
> . . . The Court finds that the unreasonable delay was substantially prejudicial to the case of Mr. Wilson in that the only witness who could explain the circumstances of the check became terminally ill during the period of unreasonable delay. Although the government contends that this is only a showing of potential or speculative prejudice, there is an absolute certainty as a signer of all checks that Mr. Schaefer would add testimony of utmost importance to the trial."

In addition, although not specifically mentioned in the opinion of the District Judge, there are considerable areas of trial testimony relevant to both the issues decided by

the Court, and the general issues of the case. The entire testimony of Jean D. Sippel (App., 76-91) deals with the payment of the check which was the subject of the prosecution, the procedures followed for the preparation and payment of such checks, the role in the union organization of the Respondent and other officers, and other matters relevant to both issues. The testimony of Fred Thompson (App., 109-131) was likewise extremely relevant to both issues. In particular, Mr. Thompson testified at some length as to the extent to which Respondent was involved in Public Relations activities relating to the non-profit housing project conducted by the union (App., 121-125), all of which testimony is obviously relevant and important to the question of the Respondent's intentions with regard to the check (and thus the issue of guilt or innocence), as well as the issue of the necessity of the testimony of Mr. Schaefer, the missing witness. It is to be noted that Mr. Thompson did not appear as a witness at the pre-trial hearings. Similarly, and perhaps most important, Respondent himself testified in great detail as to all of these matters at the time of trial (App., 135-196). (It is significant to note that Respondent testified only at the second pre-trial hearing, and his testimony on that occasion consumed only 16 pages. See App., 48-64.)

No useful purpose can be served by a complete review of all of the trial testimony, and a comparison with the pre-trial testimony, for much the same reasons that it is impossible to divine the precise trial testimony upon which the District Judge relied in entering his Order. It is for precisely this reason, it is submitted, that the *Sisson* definition of acquittal becomes necessary. Clearly, there was a host of testimony at the trial relevant to these issues, and, just as clearly, the trial testimony was substantially more complete and varied. It was likewise considerably more supporting of the Judge's Order, particularly with reference to the question of prejudice suffered by the Defendant.

Turning to an examination of *United States v. Sisson*, one notes initially that the cases are strikingly similar in their factual background. In that case, as discussed above, Defendant made certain pre-trial motions which were dismissed, and proceeded to a trial which resulted in a verdict of guilty. Following the filing of post-trial motions, the District Judge entered an order allegedly arresting judgment on grounds which were legally erroneous. As noted above, the Court concluded, in part, that an appeal would not be permitted because of the language of Section 3731 of the Criminal Appeals Act did not, at that time, allow for such appeals. However, this was not the end of the decision. As noted above, the Court also concluded, in the only portion of the opinion in which Justice Harlan wrote for a clear majority, that the order of the Trial Court in that case had been an acquittal, and was therefore not appealable on double jeopardy principles.

In so holding, the Court decided, in language elsewhere herein recited, as follows (399 U. S. at 288-90):

> "The same reason underlying our decision that this was not a decision arresting judgment—i.e., that the disposition is bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial—convinces us that the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty."

Also as noted above, Justice Harlan thereafter stated a hypothetical case, similar in factual content to the facts in *Sisson*, except that the Trial Judge instructed the jury to acquit the Defendant if it, the jury, made the same

factual findings which the Court had made in reaching its post-trial opinion. Justice Harlan concluded that, if the Jury had thereafter acquitted, there could be "no doubt that its verdict of acquittal could not be appealed under Section 3731 *no matter how erroneous the constitutional theory underlying the instructions*" 399 U. S. at 289 (emphasis in original).

After considering the hypothetical, the Court considered the differences between the hypothetical case and the case before it, concluding that the differences did not compel a different result.

The reference to Rule 29 of the Federal Rules of Criminal Procedure in Petitioner's Brief constitutes, in the opinion of the writer, an exaggeration of the importance of the reference to that Rule in the *Sisson* opinion. While it is correct that a judgment of acquittal may be entered pursuant to Rule 29 only "if the evidence is insufficient to sustain a conviction," it is not true, as is impliedly suggested by Petitioner's Brief, that an Order must clearly find the evidence insufficient in order to constitute an acquittal. Indeed, it is suggested that it is precisely because the post-trial order in *Sisson* did not clearly express the intent of the Judge that this Court determined that another test must be used. That test must equally apply here. The fact that the Judge did not specifically find the evidence insufficient is not dispositive; the test for an acquittal expounded in *Sisson* is nonetheless met.

The alteration of the *Sisson* rule suggested by Petitioner (Br., 28) would, it is submitted, reduce the rule to an inapplicable verity. There is no question that the redefinition proposed by Petitioner would define an acquittal. It would not, however, allow for its application in cases where the *essential* tests of an acquittal have been met, without specifically making the ultimate conclusion. Those

essential tests are those formulated in *Sisson*, viz.: legal determination founded upon evidence adduced at trial, which evidence goes to the general issue of the case.

In *U. S. v. Jorn, supra*, this Court was confronted with an appeal from an order dismissing an indictment on double jeopardy grounds after a District Judge had improperly and unilaterally declared a mistrial in order to permit several government witnesses to consult with their attorneys in order to determine whether they should waive their privilege against self-incrimination and testify. On appeal by the Government, this Court agreed that the District Court's judgment was appealable by the Government, and the judgment below was affirmed.

While rejecting the position of Justices Black and Brennan, who concluded that the action of the Trial Judge amounted to an acquittal, Mr. Justice Harlan wrote (400 U. S. at 478 n. 7):

> "It is clear from the record in this case that Judge Ritter's action cannot, as two members of the Court suggest, be classified as an 'acquittal' for purposes of this Court's jurisdiction over the appeal under 18 U. S. C. Section 3731. * * *
>
> Of course, as we noted in *Sisson, supra*, at 290, the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction. But *Sisson* goes on to articulate the criterion of an 'acquittal' for purposes of assessing our jurisdiction to review: the trial judge's disposition is an 'acquittal' if it is 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case * * *.' *Sisson, supra*, at 290 n. 19. The record in this case is utterly devoid of any indication of reliance by Judge Ritter on facts relating to the general issue of the case, thereby surely

distinguishing this case from *Sisson,* and, one would think, under the very reasoning of *Sisson,* compelling the conclusion that whatever else Judge Ritter may have done, he did not 'acquit' the defendant in the relevant sense."

It is apparent that, although concluding that the action of the District Judge was not an acquittal, this Court applied the *Sisson* test for determining whether it was an acquittal. In so doing, it was determined that the action did not constitute an acquittal because of the absence of any indication that the Trial Judge relied upon facts relating to the general issue of the case. Once again, this Court refused to require the application of such a strict definition as is urged by Petitioner.

This Court in *Jorn* did not mean to imply that a post trial order of a new trial following conviction would acquit a Defendant. Certainly, no such result would be required by the *Sisson-Jorn* definition of acquittal. Such an Order does not terminate the proceedings at the trial level, and it has frequently been held that, in consideration of a motion for new trial following conviction, the Defendant is considered to have waived a double jeopardy claim with respect to that motion. Thus, whether it be deemed an acquittal or otherwise would be immaterial, and the prosecution would continue. The fundamental distinction between these situations is readily apparent.

Finally, in *Fong Foo v. U. S., supra,* the trial Court's termination of the trial shortly after commencement of the prosecution's case was considered to be an acquittal and thus not reviewable. Although the Petitioner contends that this result is consistent with its position, it must be noted that the trial Court's ruling was deemed an acquittal even though the prosecution's case had not been completed. Clearly, the trial Judge's ruling could not have been considered a determination of the insufficiency of the evidence, since all of the evidence was not then in. Rather, this holding is consistent with the *Sisson* definition of acquittal, and exemplary of the reasons for, and the rectitude of, that definition.

C. The Application of the *Sisson* Definition of Acquittal in the Courts of Appeals Has Been Consistent and Requires a Finding That Respondent Was Acquitted.

1. *Post-Trial Orders.* Petitioner again relies heavily upon *U. S. v. Weinstein,* 452 F. 2d 704, cert. denied, *sub nom. Grunberger v. U. S.,* 406 U. S. 917. It is respectfully submitted that the reliance of Petitioner upon this authority is inappropriate.

In *Weinstein,* as indicated above, the Court specifically found no acquittal, and the Judge repeatedly refused to acquit the Defendant. Further, the decision clearly refuses to make a finding even resembling an acquittal, and it was the specific refusal of the District Judge to characterize his judgment as an acquittal which was most compelling to the Circuit Court.

Indicative of the reasoning of the Circuit Court in finding no acquittal is the following statement:

> "We have the gravest doubt whether the judge's undoubted power to set aside of verdict and enter a judgment of acquittal, F. R. Cr. P. 29(c) can survive the entry of a *judgment* of conviction; the two actions seem antithetical. Beyond that, however, to characterize the judge's order dismissing the indictment as one of acquittal would be to attribute to him a purpose he repeatedly and rightly disclaimed. We have already cited numerous instances of disclaimers; there are many more." 452 F. 2d at 713.

In *United States v. Whitted*, 454 F. 2d 642, the Court of Appeals for the Eighth Circuit was confronted with a situation in which, following a jury verdict of guilty in a perjury prosecution and the filing of post-trial motions, the Trial Court dismissed the indictment because the indictment may have been returned on the basis of bias and prejudice against the Defendant. In reversing this decision, the Circuit Court relied heavily on *United States v. Dooling*, 406 F. 2d 192 (2nd Cir.), cert. denied, *sub nom. Persico v. United States*, 395 U. S. 911 (1969), a second circuit case in which a similar termination of a prosecution on extremely tenuous grounds had been held to be the proper subject of mandamus. Finding no authority for the entry of such an order by a District Judge, the Circuit Court noted:

> "But as the second circuit has said, '. . . it does not lie in (the district court's) power to put an end to the case by dismissal because of vague and unsubstantiated doubts . . .' We do not believe that the trial court's attempted justification for dismissing this indictment amounts to anything more than 'vague and unsubstantiated doubts.'" 454 F. 2d at 646.

There is no dispute that the ruling of the District Court was erroneous; however, the decision is singularly lacking in support for any definition of acquittal, since the concept played no part in the opinion. Apparently, the issue was never raised. Notwithstanding the statement of the Petitioner to the contrary in its brief (Br., 38), the order of the Court of Appeals in this case was not based in any way on *U. S. v. Weinstein, supra;* the references to *Weinstein* were merely ancillary.

Petitioner also seeks to rely on *U. S. v. Jenkins*, 490 F. 2d 868, cert. granted, May 28, 1974 (No. 73-1513) as using the criteria for acquittal which it urges. We respectfully submit that this conclusion is based upon a misreading of that decision. While it is true that, in summary, Judge Friendly noted (490 F. 2d at 880):

> "*Sisson* held that when a guilty verdict has been nullified by a judge's decision to acquit *on the merits*, the Double Jeopardy Clause prevented an appellate court from directing the entry of a judgment of conviction." (Emphasis supplied),

it must be noted that this opinion specifically noted and approved the *Sisson* definition of an acquittal as an order "bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial." 490 F. 2d at 868. After concluding, on the basis of the *Sisson* definition, that the Defendant had been acquitted, Judge Friendly said further "(h)is ruling was based on facts developed at trial, which were not apparent on the face of the indictment, and which went to the general issue of the case." 490 F. 2d at 878. Clearly, the *Jenkins* Court adopted the *Sisson-Jorn* formulation of "acquittal".

Similarly, *U. S. v. McFadden*, 462 F. 2d 484, relied upon by Petitioner, cited *Sisson* in holding that Defendant therein had been acquitted at a trial before a District Judge who, after trial, entered an order dismissing the indictment on the basis of the unconstitutionality of the section of the Selective Service Law allegedly violated. *U. S. v. McFadden*, 309 F. Supp. 502. This was not the acquittal based merely on the insufficiency of the evidence urged by Petitioner.

All of these cases demonstrate an adherence to, and application of, the *Sisson* definition of acquittal as urged by Respondent. That such an interpretation is workable and reasonable can be gathered from a careful reading of all these cases.

2. *Pre-Trial Orders.* Petitioner reviews in its Brief a number of decisions involving pre-trial orders and determinations considering whether those orders constituted acquittals. While it is true that some of these decisions have applied the "insufficiency of the evidence" test for an acquittal urged by Petitioner, the application of that test was compelled in each case by the factual setting in which the opinion occurred. Clearly, where the District Judge's action has been such as to constitute a conclusion that the evidence would be insufficient to convict, there has occurred an acquittal. What is not clear, and what remains unresolved be these cases, are the reasons for concluding that acquittals occur *only* in such cases. Finally, it appears rather obvious that the *Sisson-Jorn* formulation of acquittal will find limited application in pre-trial orders, since that definition requires that the order be entered on the basis of testimony adduced at trial.

VII. Summary—Definition of Acquittal.

Once again, Petitioner seeks to impose a mechanical test for discerning acquittals. It would require, in each case, a clear finding that the evidence presented had been insufficient to sustain a verdict of guilty.

It is submitted that, while the Petitioner's test clearly defines the classic form of acquittal, the definition must be more inclusive. The *Sisson-Jorn* definition provides a simple, workable test for discerning an acquittal, and the necessity of such a test is apparent from most of the cases cited by Petitioner. In many of these, no specific finding of the insufficiency of the evidence can be discerned; rather, the Order consists of a termination of the prosecution for reasons dealing with both law and fact, and with facts relevant to the general issue and otherwise.

In short, the definition of acquittal urged herein provides a barometer against which rulings of the District Judges can be measured in determining their status as acquittals.

The use of the definition of acquittal urged herein, and previously adopted by this Court, is compelling also for reasons of simple logic. While it is not either customary or sufficiently sophisticated to be cited to this Court with any degree of frequency, Black's Law Dictionary is of some assistance in this regard. An acquittal is there defined, with regard to crimes, as "the legal and formal certification of innocence of the person who has been charged with a crime; a deliverance or setting free of a person from a charge of guilt." Black's Law Dictionary, Fourth edition. While this is, admittedly, a most unreasonably simplistic definition, it does, nonetheless, indicate clearly the fundamental nature of acquittal, as understood everywhere and to everyone.

Clearly, we do not suggest that any termination of a criminal proceeding favorable to the defense would constitute an acquittal. However, where, as in *Sisson*, you have a post-trial order terminating a prosecution on the basis of facts heard at trial, which facts are relevant to the general issue of the case, the Order can only be described as an acquittal in the classic sense. To require an acquittal to contain more is to elevate form over substance. Petitioner's definition would allow appellate Courts to inquire as to the reasons for a trial judge's rulings, and the facts upon which the Trial Court relied, at least where the acquittal was accomplished by a memorandum or opinion. This, it seems to the writer, is precisely the reason for the *Sisson* test. Appellate Courts should not be entitled to "second-guess" the reasoning or reasonableness of the Order of the Judge presiding

over the proceeding where the facts were found. So long as his decision can reasonably be said to have been predicated upon facts heard at the trial and relevant to the general issue of the case, that decision should remain undisturbed. There is no reason, in logic or law, to conclude that such an Order is not an acquittal.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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